Supreme Court, U. S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CASE NO. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
APPELLANTS,

vs.

THE STATE OF FLORIDA,
APPELLEE.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

BRIEF OF APPELLEE, THE STATE OF FLORIDA

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128
(305) 377-5441

Attorneys for Appellee

QUESTION PRESENTED

WHETHER THE DEFENDANTS NOEL CHANDLER AND ROBERT GRANGER, RECEIVED A FAIR TRIAL UNDER THE SIXTH AMENDMENT, AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED. i

TABLE OF AUTHORITIES iii

PREFACE XVII

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISION 4

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 24

ARGUMENT

First Issue

THE DEFENDANTS RECEIVED FAIR TRIAL UNDER THE SIXTH AMENDMENT 26

Second Issue

ESTES V. TEXAS, 381 U.S. 532 (1965), IS NOT A MANDATE FOR THE PROPOSITION THAT A CAMERA IN A COURTROOM IS UNCONSTITUTIONAL PER SE 56

Third Issue

IN THE TOTAL ABSENCE OF A CLEAR AND OVERRIDING FEDERAL INTEREST, THIS COURT SHOULD NOT INTERFERE WITH THE ADMINISTRATION OF THE STATE COURT JUDICIARY 112

CONCLUSION 118

TABLE OF AUTHORITIES

	PAGE
UNITED STATES CASES	
Baker v. Carr, 369 U.S. 186 (1962).....	33
Beck v. Washington, 369 U.S. 541 (1962).....	35,36,113
Bradley v. Texas, 450 S.W.2d 847 at 853 (Tex. Cr. App. 1970).....	80
Broaderick v. Oklahoma, 413 U.S. 601 (1973).....	34,35,113
California Bankers Assoc. v. Shulty, 416 U.S. 21 (1974).....	32
Calley v. Calloway, 519 F.2d 184 (5th Cir. 1975), cert. den., 425 U.S. 911 (1976).....	37
County Ct. of Ulster County N.Y. v. Allen, ___U.S.___, 99 S.Ct. 2213 (1979).....	31,32,34, 112
Estes v. Texas, 381 U.S. 532 (1965).....	2,24,33, 56,69,72, 73,74,75, 77,78,79, 81,82,88, 89,96,98, 101,110, 114-118

TABLE OF AUTHORITIES
CONTINUED

	PAGE
Gregg v. Georgia, 428 U.S. 153 (1976).....	54
Henderson v. Kibbe, 431 U.S. 145 (1977).....	113
Irvin v. Dowd, 366 U.S. 717 (1961).....	36-40
Leland v. Oregon, 343 U.S. 790 (1952).....	117
Marshall v. United States, 414 U.S. 417 (421-422) (1974).....	110
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).....	110
McKeiver v. Pennsylvania, 403 U.S. 528 (1971).....	117
Murphy v. Florida, 421 U.S. 794 (1975).....	36,38,78, 89,113
Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976).....	36,39,72, 79
New State Ice Co. v. Liebmann, 285 U.S. 262 (1931).....	114
Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).....	113

TABLE OF AUTHORITIES
CONTINUED

	PAGE
Oshea v. Littleton, 414 U.S. 488 (1974).....	113
Parker v. Levy, 417 U.S. 733 (1974).....	33
Railroad Commission v. Pullman Co., 312 U.S. 496 (1971).....	113
Reynolds v. United States, 98 U.S. 244 (1878).....	35
Richmond Newspapers v. Commonwealth of Va., U.S. , 48 U.S.L.W. 5008 (1980).....	26,35,43-45,48,49,51-53,55,79,94,105,107,109,117,119
Rideau v. Louisiana, 373 U.S. 723 (1963).....	41,42
Russell v. Southard, 53 U.S. 12 (How.) 139 (1851).....	35
Sheppard v. Maxwell, 384 U.S. 333 (1977).....	39,41,78,104
Spencer v. Texas, 285 U.S. 554 (1967).....	113,115
Stone v. Powell, 428 U.S. 181 (1952).....	69,70,71
United States v. Raines, 362 U.S. 17 (1960).....	31

TABLE OF AUTHORITIES
CONTINUED

PAGE

Wainwright v. Sykes,
432 U.S. 72 (1977)..... 113

Whalen v. Roe,
429 U.S. 589 (1977)..... 113

Williams v. Florida,
399 U.S. 117 (1970)..... 113

Young v. American Mini
Theatres,
427 U.S. 50 (1976)..... 34

Younger v. Harris,
401 U.S. 37 (1971)..... 34,113

OTHER CASES

Chandler v. State,
366 So.2d 64 (Fla. 3d DCA
1979)..... 1,2,7,8,21,
43

Chandler v. State,
376 So.2d 1157 (Fla.
1979)..... 1,2,23

Commonwealth v. Hayes,
___Pa.___, 414 A.2d 318
(Pa. 1980)..... 79,106

Commonwealth v. Martin,
465 Pa. 134 (1975)..... 80

Glassman v. State,
377 So.2d 208 (Fla. 3d DCA
(1979)..... 28

TABLE OF AUTHORITIES
CONTINUED

PAGE

Gonzalez v. People,
105 Colo. 322, 438 P.2d
686 (1968)..... 80

Great Falls Tribune v.
District Court,
___P.2d___ (Mont. 1980),
S.Ct. Case No. 79-83,
Opinion filed March 19,
1980..... 79

Hoy v. State,
353 So.2d 826 (Fla. 1978). 28

In Re Hearings Concerning Canon
35 of the Canons of Judicial
Ethics,
132 Colo. 591, 296 P.2d
465 (1956)..... 45,64,106

In Re Mark,
386 Pa. 251, 126 A.2d
679 (1956)..... 60

Jacobson v. State,
375 So.2d 1133 (Fla. 3d
DCA 1979)..... 28

Lyles v. State,
330 P.2d 734 (Okla.1958).. 67,68

People v. Stroble,
36 Cal.2d 615, 226 P.2d
330 (1951)..... 70

Petition of Post-Newsweek
Stations, Florida, Inc.,
370 So.2d 764 (Fla.1979).. 2,8,23,24,
54,83,87-
89,91,94,
107,109,110

TABLE OF AUTHORITIES
CONTINUED

PAGE

Petition of Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla. 1976)... 8,82
Modified, 337 So.2d 804 (Fla. 1976)..... 8,83
Modified, 347 So.2d 402 (Fla. 1977)..... 8,84
Modified, 347 So.2d 404 (Fla. 1977)..... 8,84,85

Petition of Post-Newsweek Stations, Florida, Inc., 258 So.2d 1360 (Fla. (1978)..... 8,86,87

Powers v. State, 369 So.2d 640 (Fla. 3d DCA 1979)..... 28

State v. Bundy, 4th Med.L.Rptr. 2629 (Fla. 11th Cir. 1979)..... 28

State v. Cline, 555 P.2d 724 (Mont. 1976). 80

State v. Diggs, 11th Judicial Circuit, Case No. 79-21601..... 28,102,104

State v. Ecker, 311 So.2d 104 (Fla. 1975). 33

State v. Hagan, 24 N.Y.2d 395 (1969)..... 80

State v. Hauptman, 115 N.J. 412, 180 A. 809 (1935)..... 57,58,104

TABLE OF AUTHORITIES
CONTINUED

PAGE

State v. Jones,
11th Jud. Cir., Case
No. 80-3039..... 28

State v. Langley,
214 Ore. 445, 323 P.2d
301 (Ore. 1958)..... 69

State v. Schmid,
109 Ariz. 349, 509 P.2d
619 (1973)..... 80

State ex rel. Grinnel Communications Corp. v. Love,
62 Ohio St.2d___ (June
18, 1980)..... 111

Street v. State,
237 Ga. 307 (1976)..... 80

United States v. Haldeman,
559 F.2d 31, 62 n. 37
(D.C.Cir. 1976)..... 37

United States v. Mandell,
408 F.Supp. 673 (D.Md.
1975)..... 37
415 F.Supp. 1033 (D.Md.
1976)..... 37
431 F.Supp. 90 (D.Md.
1977)..... 37

Wansley v. Commonwealth,
210 Va. 462 (1970)..... 80

Willard v. State,
400 N.W.2d 151 (Ind.
(1980)..... 79

TABLE OF AUTHORITIES
CONTINUED

PAGE

Zamora v. State,
361 So.2d 776 (Fla. 3d
DCA 1978).....15,28,101,
102,117

UNITED STATES CONSTITUTION

Amendment VI.....4

Amendment XIV.....4

UNITED STATES CODE

28 U.S.C. §1257(2).....3

FLORIDA CONSTITUTION

Article I, Section 16.....4

Article II, Sections 8(a)
and (b).....108

FLORIDA STATUTES

Chapter 119 (1977).....108

Section 286.11.....108

Section 924.33.....5

RULES

Florida Judicial Canon 3A(7)..5,7,8,10,
24,26,54,56

TABLE OF AUTHORITIES
CONTINUED

PAGE

Florida Rules of Appellate Procedure 9.030(a)(2)(A)(ii)... 21

STANDARDS

American Bar Assoc. Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press Standard 8-3.2 (Approved Draft 1978).... 39

American Bar Assoc. Standards Relating to the Administration of Criminal Justice Standard 8-3.6(a) (Tentative Draft 1978)..... 62

American Bar Assoc. Canon 35... 25,59,60, 63

Canon 3A(7), Fla. Code of Judicial Conduct (1979)..... 5,7,8,10, 24,26

ARTICLES

Blasfield, "The Case of the Controversial Canon," 48 A.B.A.J. 429 (1962)..... 59,60

Broholm, "Electronic Media in the Courtroom," May Case and Comment 3 (1980)..... 77,98

Geis, "Canon 35 in the Light of Recent Events," 43 A.B.A.J. 420 (1957)..... 99

TABLE OF AUTHORITIES
CONTINUED

PAGE

Gerbner, "Trial by Television: Are We at the Point of No Return?," 63 Judicature 416 (1980).....29,77

Goldman, J. and Larson, "News Camera in the Courtroom During State v. Solorzano: End to Estes Mandate?" 10 S.W.New.L.R. 2001 (1978).....41,63, 95,97,103,104

Hall, J. "Colorado's Six Years Experience without Judicial Canon 35," 48 A.B.A.J. 1120 (1962).....66,97

Hallom, "Some Object Lessons on Publicity in Criminal Trials," 24 Minn.L.Rev. 453 (1940).....59,103

Heflin, "Fair Trial v. Free Press: Time for a Rehearing?" 61 Judicature 154 (1977).....107

"Judicial Canon 35: Revise or Retain," 37 Fla.B.J. 16 (1963)..... 63

Kielbowicz, "The Story Behind the Adoption of the Ban on Courtroom Cameras," 63 Judicature 14 (1979)..... 57-59,81

Miller, "Should Canon 35 be amended?" 42 A.B.A.J. 834 at 892 (1956).....107

TABLE OF AUTHORITIES
CONTINUED

PAGE

Netteberg, "Does Research Support the Estes Ban on Cameras in the Courtroom," 63 Judicature 466 (1980).....25,96,97, 99,117

The News and the Law, "TV in Court: Seven States Approve," (Dec. 1977) pp.24-25 (Diagram of Zamora courtroom).....85

Note, "Cameras in the Courtroom: A Denial of Due Process?" 30 Baylor L.R. 852 (1978).....57

Simonberg, "TV in Court, The Wide World of Torts," Juris Doctor 41, at 44 (April, 1979).....111

"Televising Court Trial in Canada: We Stand Guard for a Legal Apocalypse," 5 Calhonsie L.J. 694 (1979)..... 30

Tello, "The Zamorer Trial Makes T.V. History" Lighting Dimensions (March 1978)..... 86

Warden, "Canon 35: Is There Room for Objectivity?" 4 Washburn L.J. 211 (1965).....59,60

Weinstein, "Let the People Observe their Courts," 61 Judicature 156 (1977).....106

Whisenand, "Cameras and Courtrooms: Fair Trial-Free Press Standards," 52 Fla. Bar J. 456 (1978)..... 62

TABLE OF AUTHORITIES
CONTINUED

PAGE

Wilson, "Justice in Living Color," 60 A.B.A.J. 294 (1974)... 98

OTHER AUTHORITIES

A.B.A. Rep. 240 (1937)..... 58

77 A.B.A. Rep. 110 (1952)..... 61

Briefs of Amicus Curiae

Radio and Television News Directors Assoc.....80,81,117

American College of Trial Lawyers.....29,30

California Public Defender, et al.....29,107

Conference of Chief Justices.....118

Post-Newsweek, et al.....96,105, 106,108

Public Broadcasting System, et al.....77,96

Wisconsin, et al.....95,116

Humphries, "Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom,".....95

Miami Herald

Beach Cops Staged Break-In 'as joke'" Nov. 18, 1977, p. 1D.....84

TABLE OF AUTHORITIES
CONTINUED

PAGE

"Five Officers Charged in Slaying," Dec. 29, 1979, p. 1A..... 103

"Ham Hears Burglary, Two Officers Arrested," July 2, 1977, p. 1A..... 84

"Radio Enthusiast Unsure of Date He Heard Cops," Dec. 7, 1977, p. 1A..... 84

"Survey Reveals Unprecedented Black Bitterness," June 22, 1980, p. 1A; 23A..... 103

"Wives of Beach Cops Testify" Dec. 8, 1977, p. 1B..... 84

Miami News

"Beach Policemen Charged with Burglary," July 2, 1977, p. 1A..... 84

"Trial Date Set for Two Beach Policemen," July 20, 1977, p. 1B..... 84

New York Penal Law, §265.16 (3)..... 31

Report to Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom" (April 1, 1979)..... 95

TABLE OF AUTHORITIES
CONTINUED

PAGE

Sterns & Gressman, Supreme Court Practice, §13.11 at p. 720 (5th Ed. 1978)..... 107

Thode, Reporters Notes of Code of Judicial Conduct, p. 57 (1973)..... 61

"Broadcasting the Proceeding of the House: A report of the Committee on Rules on its study of Alternative Native Methods of Providing Complete and Unedited Audio and Visual Broadcasting of the Proceedings of the House of Representatives, Pursuant to Section 3 of the House Resolution 866 Ninety-Fifty Congress together with Supplemental Authority, Dissenting and Minority Views," 95th Cong. 2d Sess (Feb. 15, 1978), at pp.39-45; 56-59.....108,109

Roper Organization Inc., "Public Perceptions of Television and Other Mass Media: A Twenty Year Review (1958-1978)" April, 1979)..... 108

"Washington Bench-Bar-Press Committee, Report of Subcommittee on Canon 35" (April 5, 1975).. 96

PREFACE

The Appellants, Noel Chandler and Robert Granger, were the Defendant in the Florida trial court below. The State of Florida was the prosecution below. In this brief, the parties will be refered to as they appeared in the trial court below.

The following references are made in this brief:

(R) For the Record-on-Appeal previously transmitted under separate cover and consisting of pages R1-R1317.

(A) For the Joint Appendix submitted by the parties consisting of page A1-A17.

(AA) For the Appendix to the brief of the State submitted herewith, consisting of pages AA1-AA72.

(AB) For the Appendix to the Defendants' brief consisting of page AB1-AB18.

I.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, affirming the convictions of the Defendants, Chandler and Granger, is reported at, Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979). The opinion of the Supreme Court of Florida affirming the Florida District Court of Appeal and dismissing the Defendants' Petition for Certiorari is reported at, Chandler v. State, 376 So.2d 1157 (Fla. 1979). There are no official reports for citation of these decisions.

II.

JURISDICTION

On September 27, 1979, and by rehearing denied on December 10, 1979, the Supreme Court of Florida declined to consider the Defendants' complaint in both the District Court of Appeal and the Supreme Court that the presence of a television camera during their criminal trial below was unconstitutional per se, under, Estes v. Texas, 381 U.S. 532 (1965). See, 366 So.2d at 69 (certified question); 376 So.2d 1157. The Supreme Court of Florida considered the question moot in view of, Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), which was rendered during the pendency of the Defendant's appeal from the District Court of Appeal.

On January 3, 1980, the Defendants filed a timely Notice of Appeal. See, Appendix to Jurisdictional Statement, at 26. Jurisdiction is properly lodged in this Honorable Court pursuant to 28 U.S.C. § 1257(2).

III.

CONSTITUTION AND STATUTORY PROVISIONS

U.S. Constitution Amend.VI provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

U.S. Constitution Amend.XIV provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Article I, Section 16 of the Constitution of the State of Florida provides that:

> "SECTION 16. Rights of accused.--In all criminal prosecutions the accused

> shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. . . ."

Section 924.33, F.S. (1977) provides:

> "When judgment not be reversed or modified.--No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. . . ."

Canon 3A(7) of the Florida Code of Judicial Conduct (1979) provides:

> "Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure, decorum and prevent distractions, and (iii) ensure the firm administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida."

IN THE

Supreme Court of the United States

CASE NO. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
APPELLANTS,

vs.

THE STATE OF FLORIDA,
APPELLEE.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

BRIEF OF APPELLEE, THE STATE OF FLORIDA

IV.

STATEMENT OF THE CASE

The Defendants, Noel Chandler and Robert Granger, were charged by information with one count of consipracy; one count of burglary; one count of grand larceny and one count of possession of burglary tools, arising out of their burglary on May 23, 1977, of Picciolo's

Restaurant, Miami Beach, Florida. See, R1098-1100. The Defendants were both police officers employed by the City of Miami Beach, Florida. See, Chandler v. State, 366 So.2d 66 (Fla.3d DCA 1979). The Defendants' apparent theory of the case below, was that the ham radio operator's inadvertent recording of their conversations on their walkie-talkie radios as they burglarized Picciolo's Restaurant, was not made on the night that Picciolo's was burglarized, but instead was made a week later when the Defendants "staged" a burglary.[1] See, R222-224; R232-240; see also, 366 So.2d at 70. After a trial by jury, the Defendants were convicted as charged. R288-1291.

Relevant to this appeal, during the pendency of the prosecution below, the Supreme Court of Florida modified Canon 3A(7) of

---

[1]The opinion of Chandler v. State, 366 So. 2d 64 (Fla.3d DCA 1979), contains an excellent summary of all other aspects of the trial below.

the Florida Code of Judicial Conduct to permit under specific guidelines, the presence of one television camera and one still photographer in fixed positions during the Defendants' trial[2]. Before trial, the Defendants filed assorted motions to declare Florida's experiment with Canon 3A(7) unconstitutional, alleging that the Defendants would not get a fair trial and that the presence of a camera[3] at trial

2. See, Petition of Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla. 1976), modified, 337 So.2d 804 (Fla. 1976); modified, 347 So.2d 402 (Fla. 1977), modified, 347 So.2d 404 (Fla. 1977). Florida Judicial Canon 3A(7) was only suspended and was never actually modified during a year of an experimental pilot program. See, 347 So.2d at 404-405. Subsequently Canon 3A(7) was reviewed and modified as a permanent rule consistent with the one year pilot program. See, Post Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979); see also, Petition of Post-Newsweek Stations, Florida, Inc., 358 So.2d 1360 (Fla. 1978), modifying schedule and denying extension of the experiment).

3. In all of the Defendants' Motions and indeed, throughout the argument in both the Defendants and the Amicus Curiae briefs, incorrect reference is made to television "cameras" and to still "photographers" at the Defendants' trial. It

will harm "prospective" witnesses, jurors, the Defendants' attorney and the trial judge. A3-A5 (R1117-R1118; R1126-R1127). The Defendants also claimed that since there had been a "substantial amount" of pretrial publicity, the Defendants would be denied due process of law. See, A4 (R1118; R1127). The Defendants subsequently renewed their motions, objecting to the presence of a television camera and a still photographer[4] in their trial and moved to exclude them. A5 (R1124-R1125). All of the Defendants' Motions were denied. See, A6 (R1128); AB4. The transcripts of the hearings upon the foregoing motions are not included in the Record-on-Appeal. Similarly, a pretrial Motion to Suppress was also heard

---

3. (cont.) is undisputed that there was only one television camera during the trial and that there was no reference to the one still photographer permitted, at any time.

4. Note 3, supra.

and denied in the case at bar[5]. See, R1129-R1135; R2-R42.

On December 1, 1977, when the parties convened to select a jury, the Defendants renewed their motion to exclude a television camera and a still photographer from their trial, upon the ground that Canon 3A(7) [as modified by Court rule] was unconstitutional. See, A6-A7 (R55-R57; R1104). The Defendants also orally requested that the jury be sequestered, because the television camera would be at the trial. A6-A7 (R57). There was neither a still camera nor a television camera present at the time of the Defendants' oral motions. See, A7 (R55-R57). Both of the Defendants' Motions were denied. A6-A7.(R57). The Defendants further asked the trial Court to instruct witnesses not to watch any television

---

5. There were no electronic media noted as presented on the record, at any of the pretrial proceedings.

accounts of the trial, which was granted. See, A7 (T57-T58). Subsequently, the Defendants complained to the trial Court that one witness, Donald Froschneider, could not attend because he was too sick. T60. The Court indicated it would provide appropriate remedies. See, T60-T61. Thereupon, the panel of jurors was subsequently brought in and the voir dire of the panel to select a petit jury began. See, R16; R1104.

Relevant to this appeal, the jury in the case at bar ultimately consisted of, Burton (No. 371); Cook (No. 3880); Fleming (No. 440D); Metzger (No. 396D); Callahan (No. 356); Hawkins (No. 410) and an alternate, Turner (No. 385). See, R1104-R1105. At the beginning of jury selection, during a side bar conference, defense counsel noted for the record that, "the [television] cameras are in the courtroom." A8(R65). The trial court corrected defense counsel,

observing that, "[t]here is a [television] camera in the Courtroom"[6]. See, A8(R65). During the subsequent voir dire, Burton testified that she had heard something "on the news," about the case, but could not recall, "too much about it" and that she had formed no opinions about the guilt or innocence of the Defendants. R121-R122. Callahan stated that:

> "I read a little piece in the newspaper about it. That is about the same information you have given so far."
>
> R132.

Cook testified as to his knowledge of the case thus:

> "THE COURT: Do you know anything about this case from the media?
>
> "MR. COOK: Possibly something from television, but nothing that I can clearly remember.
>
> "THE COURT: You did not form any opinions about the guilt or innocence of these defendants, did you?

---

6. The camera was from Channel 10, WPLG, Miami, Florida, which is operated by Post-Newsweek Stations, Florida, Inc. See, R65;R374.

"MR. COOK: I did not.

R178.

The alternate juror, Turner, who did not participate in the deliberations below[7], testified that:

> "THE COURT: Do you know anything about the facts of this case, Mr. Turner?
>
> "MR. TURNER: Only one point that I heard on the radio. All I remember was the radio.
>
> "THE COURT: Did you form any opinions about the guilt or innocence of these defendants?
>
> "MR. TURNER: None whatsoever."

R192.

All of the other jurors and prospective jurors had not seen, heard or read anything whatsoever about the case. R74 and R93 (Fleming); R76 and R93 (Metzger); R155 (Hawkins); R72, R80, R82, R93, R130, R135, R153, R158, R164 (all other prospective jurors). Burton, Cook, Callahan and Turner affirmatively testified that they would each put aside anything that they might know or

[7]. See, R1113; R1071.

might remember and would decide the case only upon what they heard in the Courtroom. R122 (Burton); R132 (Callahan); R178-R179 (Cook); R192 (Turner). All of the jurors were specifically instructed at the beginning of the trial to confine their deliberations to what they have heard in the trial, thus:

> "During the trial, you must not discuss the case among yourselves, nor with anyone else, nor permit anyone to discuss it in your presence. You must also avoid watching, reading, seeing or listening to anything about this case on any of the media. You must confine your deliberations in this case specifically to what you have heard in this courtroom."
>
> A13(R204).

The jurors and prospective jurors affirmatively indicated that they would abide by the instructions of the trial court. See, R97; R114-R116; R142; R149; R185. The jurors also indicated that if anything "came up" during the course of the trial regarding the trial court's instructions, that they would bring it immediately to the

attention of the Court. See, R99; R116; R142; A12 (R183); A12 (R196). At the beginning of the trial the court instructed the jury that they must follow the court's instructions throughout the trial, to wit:

> "At this time, we are going to take a ten-minute recess, after which you will hear the opening statements of the lawyers. At this recess and all others, you must remember and obey the instructions that I gave. Do not form opinions about the case. Do not form or discuss it with anyone else until it is all over."
>
> R204.

Relative to the presence of a television camera, juror Fleming testified that she was familiar with and had seen a portion of the "Zamora" trial[8]. on a television news program. A8 (R93). Thereupon, during the questioning of a prospective juror, Warren[9]., the following exchange

---

8. See, Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978).

9. Warren was subsequently dismissed from the jury by the Defendants. See, R116; R1104.

took place".

"[By Defense Counsel],

MR. HIRSCHHORN: Was there anything about the fact that that case as being televised live that would affect you here today? In other words, before you jump to the answer, it is important because not every case is televised.

"What I am trying to find out really is will you be able to be as conscientious, as fair and as impartial in this case, even if that camera remains in this courtroom during part or all of this trial, or are you likely to say to yourself, "Well, there is something special about this case," and perhaps give this case a different kind of treatment that you would.

"Miss Warren?

"MISS WARREN: Yes.

"MR. HIRSCHHORN: Mr. Vidal --

"THE COURT: That "yes" was --

"MR. HIRSCHHORN: It is telling me something, Judge. I understand, but if I might get back to it, Your Honor --

"THE COURT: I hestitate to have the record leave that "yes" in the record, as is.

"MR. HIRSCHHORN: I understand. I will get back to it, if I might, Your Honor.

. . .

"MR. HIRSCHHORN: Miss Warren? Can you hear me now?"

"MISS WARREN: Yes. I hear you."

A8-A9 (R94-R95).

Contrary to the Defendants' "Statement of the Case" (p.6), the prospective juror, Warren's "yes", is (as the trial court attempted to clarify), only a response to the question, "Mrs. Warren?" It is not, as the Defendants strain to infer, an indication that the prospective juror attached more importance to the case, because of the presence of a camera. As part of a response to the inquiry of the prospective juror Warren, juror Metzger indicated, that the mere presence of a camera during the trial did not give the trial any special importance and that with the camera present he would be fair and impartial. A9 (R94-R95). Juror Fleming was asked the same questions together with Metzger, but the record reflects no separate response. See, A8-A9 (R94-R95). The jurors and the

alternate juror indicated that the mere presence of a television camera during the trial would have no effect upon them as jurors[10]. See, A11 [R95 (no verbal answer) and R141](Fleming); A11 (R141)(Metzger); A11 (R168)(Hawkins); A12 (R182) (Cook); A12 (R196)(Turner). Both the Defendants and the State accepted the jury and the jury was thereupon sworn in. R202-203.

On December 5, 1977, at the beginning and conclusion of the first day of the trial, the Defendants again orally moved to sequester the jury, stating on the latter occasion that the jury should be sequestered "in light of the media coverage". A13 (R205); A14 (R350). The Record-on-Appeal is utterly devoid of any showing at

---

10. Jurors, Burton and Callahan, were not specifically asked this question by defense counsel, but were present when Hawkins, Cook and Turner were asked the same question. See, R117 (Burton and Callahan called as jurors). Two of the jurors were asked if they had been on television and Metzger replied that he had. A10 (R96).

anytime, of the kind or extent of publicity or media coverage, or any other facts supporting a sequestration of the jury. The Defendants' Motions were both denied. A13 (R205); see, A14 (R305). The trial Court specifically again instructed the jury at the conclusion of first day of trial that:

> "THE COURT: It is also very important that you are to avoid seeing and hearing anything about this case as reported in any of the media. Do not read any newspaper articles about it. Perhaps it might be a good idea if you just avoid the local news and watch only the national news on television. If somebody calls out any report of this case to your attention, you may say that is the jury I am serving on. Do not say anything more about it."
>
> "It is very important, as I told you, you are not to let anything which happens outside the courtroom interfere. Your decision must be based solely on what happens inside the courtroom."
>
> A13 (R349).

Subsequently, the court's instructions were renewed at the conclusion of the state's case and again after the Defendant's case

and both parties had rested[11]. A16-A17 (R653; R923). For the first time at the conclusion of the first day of trial, the Defendants requested that the trial court rather than counsel for the respective parties instruct each witness as to television sequestration. A14 (R350). The trial court declined, finding that instruction by counsel would be sufficient and that no witness testimony had been reported by the media. A14 (R350). There was no testimony at trial that any witness had seen, heard or read any other witnesses' testimony in violation of sequestration or that witness sequestration had been violated in any way.

On appeal to the District Court of Appeal of Florida, Third District, the Defendants claimed, relevant to the case at bar, 1) that the Florida experimental pilot

---

11. The parties produced nineteen (19) witnesses and sixteen (16) witnesses respectively.

program permitting cameras in the courts of Florida is unconstitutional per se; 2) that the trial court erred in refusing to exclude a television camera from their trial and 3) that the trial court erred in refusing to sequester the jury[12.], 366 So.2d at 69. The Florida District Court rejected the Defendants' claim that the pilot program was unconstitutional per se, upon the reasoning, that by virtue of the fact of the one year pilot program, the Florida Supreme Court had made a preliminary determination that a camera in a Florida courtroom was not unconstitutional per se. 366 So.2d at 69. Nevertheless, the Florida District Court certified the question to the Florida Supreme Court as a question of great public interest. See, Fla.R.App.P. 9.030 (a)(2)(A)(ii). The

---

12. No issue of witness sequestration was asserted in the Florida appellate courts. See, Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979).

District Court rejected the Defendants' latter contentions also, opining that:

> "We pass on to that portion of the defendants' point which urges that matters occurring in their trial pursuant to the experimental canon deprived them of their right to a fair trial and was violative of due process of law. The defendants urge error with regard to two rulings allowing television cameras in the courtroom during their trial; error is urged (1) in declining to preclude television cameras from their trial and (2) in declining to sequester the jury. However, the defendants have not met their burden of showing from this record that either of these circumstances operated to deprive them of a fair trial.
>
> "We have examined the record in the light of the defendants' contentions under this point and find no reason on this record to hold that the admission of television cameras into this particular trial caused the defendants any difficulty in the preparation or presentation of their case or deprived them of a impartial jury. Accordingly, we hold that no error is shown by the defendants' first point.
>
> 366 So.2d at 69.

Relevant to this appeal, the Supreme Court of Florida found the certified question regarding the constitutionality per se of the presence of a television camera moot

in view of Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), which was rendered during the pendency of the appeal from the Florida District Court. 376 So.2d 1157. The Court declined to entertain the remaining questions upon jurisdictional grounds. Id. The Defendants subsequently filed a timely Notice of Appeal in this Honorable Court.

V.

SUMMARY OF ARGUMENT

First Issue

THE DEFENDANTS RECEIVED A FAIR TRIAL UNDER THE SIXTH AMENDMENT.

The Defendants' argument is dehors the record. The Defendants cannot defeat their lawful convictions in the total absence of a record showing of the nature and extent of pretrial and trial publicity or any other relevant showing of prejudice. The Defendants cannot defeat their convictions by arguing the hypothetical rights of hypothetical persons in hypothetical circumstances under Canon 3A(7), absent a clear First Amendment claim. The record affirmatively demonstrates that the participants and the jurors were wholly unaffected by any publicity and the mere presence of a television camera during the trial below. The Defendants' attempt to upset their convictions by a post hoc attack upon

Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), must be rejected.

Second Issue

ESTES V. TEXAS, 381 U.S. 532 (1965) IS NOT A MANDATE FOR THE PROPOSITION THAT A CAMERA IN A COURTROOM IS UNCONSTITUTIONAL PER SE.

Proper analysis of Estes v. Texas, affirmatively demonstrates that Estes is not a mandate against the mere presence of a camera in a courtroom. Historical analysis reveals that both Estes and ABA Canon 35 were the peculiar result of limited historical circumstances. Estes must therefore be confined as a precedent to its peculiar facts. The argument, that it is okay if some of the people see a trial, but it is unconstitutional if all of the people see a trial, is without a rational, constitutional basis. To the contrary, the actual experience of Florida and other states and the experimental and permanent

rules in more than twenty-eight (28) states affirmatively demonstrate that a camera in a courtroom is not unconstitutional per se. The parade of horribles and hyperbole suggested by the Defendants because of the mere presence of a camera have not materialized in the actual experience of Florida and other states. The Florida Supreme Court's amendment of Florida Judicial Canon 3A(7) is well reasoned and soundly based upon substantial policy considerations of proper judicial administration, which are underscored in both Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), and Richmond Newspapers v. Commonwealth of Virginia, __ U.S. __, 48 U.S.L.W. 5008 (1980).

Third Issue

IN THE TOTAL ABSENCE OF A CLEAR AND OVERRIDING FEDERAL INTEREST, THIS HONORABLE COURT SHOULD NOT INTERFERE WITH THE ADMINISTRATION OF THE STATE COURT JUDICIARY.

The maintenance of the principles of comity and federalism are a primary consideration in interpreting the application of the Sixth Amendment to the States through the Fourteenth Amendment, to state action. This Court has consistently encouraged experimentation in the "laboratory" of the states predicated upon the basic structure of federalism. The substantial state interest in Florida in open government and public confidence in the judiciary, is a reasonable and rational basis for the exercise of the Supreme Court of Florida's supervisory powers of judicial administration. The fact of earnest experimentation of the states with respect to electronic media in state courtrooms should be left unfettered, absent a clear, compelling and substantial federal question.

VI

ARGUMENT

First Issue

THE DEFENDANTS DID RECEIVE A FAIR TRIAL UNDER THE SIXTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

A. The argument of the Defendants, Chandler and Granger is dehors the record in the case at bar. The Defendants unabashedly complain in anecdotal fashion, without references or citation of authority, about the recent trials of other defendants in Florida where a camera was present[13]. Neither the Defendants nor the

13. See, State v. Jones, 11th Jud.Cir. Case No. 80-3039 (Grand Theft-no objection to camera); State v. Diggs, 11th Jud.Cir. Case No. 79-21601 (Murder, so called "McDuffie" case-no objection to camera; defendants acquitted); State v. Bundy, 4th Med.L.Rptr. 2629 (Fla. 11th Cir. 1979)(Murder-no showing that closure warranted; and that alternative trial management methods will not suffice); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978)(Murder-no objection to camera); see, also,e.g., where a camera was present without objection, Glassman v. State, 377 So.2d 208 (Fla. 3d DCA 1979); Jacobson v. State, 375 So.2d 1133 (Fla. 3d DCA 1979); Powers v. State, 369 So.2d 640 (Fla. 3d DCA 1979); Hoy v. State, 353

amicus curiae briefs of the California Public Defender and the American College of Trial Lawyers, make any effort whatsoever, to discuss how Noel Chandler and Robert Granger were denied either an impartial jury or a fair trial. Instead, the Defendants and the amicus curiae briefs speculate ad infinitum, as to the hypothetical effects of a camera upon hypothetical circumstances involving hypothetical defendants, jurors and witnesses. Instead of addressing the case at bar, the Defendants and the amicus curiae argue irrationally, 'what if' this and 'what if' that[14]. See also, Gerbner, "Trial by

13. (cont.) So.2d 826 (Fla.1978), cert.den., 439 U.S. 820 (1979). The Appellee, the State of Florida would offer this Honorable Court for consideration at its leisure, both the P.B.S. tapes of the Jones, Bundy; Diggs, Powers and Zamora trials together with the equipment necessary for this Honorable Court's viewing of what the Defendants term "debacles" (Br. at p. 33).

14. As for example the Defendants and amicus assume that a "distraction" in a courtroom is permanent, irrevocable, preju-

Television: Are we at the Point of No Return?" 63 Judicature 416 (1980), (assuming and comparing televised trials with commercial programming); "Televising Court Trials in Canada: We Stand Guard for a Legal Apocalypse:, 5 Dalhonsie L.J. 694 (1979). Indeed, the Defendants substantially concede that there was no "specific mischief: in the case at bar even to demonstrate arguendo that their trial was unfair or the jurors were not impartial. (See, Br. at p. 13 and 69). See also, Br. Amicus Ca.Pub. Def. at p. 26 ("nothing can be proved"); Br. Amicus Amer. College Trial L., p. 24 (prejudice in presence of a camera, "not identifiable").

---

14. (cont.) dicial and unconstitutional; that the incremental presence of a television camera for any length of time renders any length of trial suddenly unconstitutional; that if a television camera is not present in a high interest trial, there will be no publicity to affect the court, parties, witnesses or jurors.

At the outset, the State would note that the Defendants characterize their challenge herein as one directed at a statute (Br.,p.3). In United States v. Raines, 362 U.S. 17, 21 (1960), relevant to the case at bar, the Court observed that:

> "One to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." [Emphasis added].

More recently, in County Court of Ulster County, New York v. Allen, __U.S.__, 99 S.Ct. 2213 (1979), the defendant/petitioner upon a due process claim had sought to overturn New York Penal Law §265.16(3), which provides that the presence of a firearm in a vehicle is presumptive of its possession by the occupants. Id. at 2217. The United States Court of Appeals for the Second Circuit had held that the statute was "unconstitutional on its face."

568 F.2d 998, 1009. In reversing the Circuit Court of Appeals, the Allen Court again emphasized that:

> "A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (and cases cited). A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. . . . This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. E.g., Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408; Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22." [Emphasis added]. 99 S.Ct. at 2223.

The Allen Court, finding no First Amendment claim, held the New York Statute was constitutional as applied. 99 S.Ct. at 2226-2230. See also, California Bankers Association v. Shulty, 416 U.S. 21, 71-72 (1974) (where the Court declined to con-

sider a Fifth Amendment claim based upon speculation and hypothetical persons); Cf., Parker v. Levy, 417 U.S. 733, at 756 (1974) ("one to whose conduct a statute clearly applies may not challenge it for vagueness"); State v. Ecker, 311 So.2d 104, at 110 (Fla. 1975), cert. den. 423 U.S. 1019 (1975), ("while the loitering statute might be unconstitutionally applied in certain situations, this is no ground for finding the statute itself unconstitutional").

The fundamental policy underlying a requirement that a defendant must make a showing of actual prejudice and thereby a personal stake in the outcome of the controversy is, "to assure, that concrete adverseness, which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions [.]" Baker v. Carr, 369 U.S. 186, at 204 (1962); see, also Estes v. Texas, 381 U.S. 532 at

601-604 (Stewart, J., joined by Black, J.; Brennan, J. and White, J., dissenting) (the court should not elevate hypothetical examples into a per se rule of constitutionality). Otherwise, this Court is relegated to being a "roving [commission] assigned to pass judgment on the validity of the [state's] laws." Broderick v. Oklahoma, 413 U.S. 601, 611 (1973); see, Younger v. Harris, 401 U.S. 37, 52 (1971). Even where there is a First Amendment issue present:

> "[I]f the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' see Erznozmik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125, the litigant is not permitted to assert the rights of third parties." [Emphasis added].
>
> Young v. American Mini Theaters, 427 U.S. 50, 60 (1976).

See, Allen, 99 S.Ct. at 2223-2224, n.14. In the case at bar, ironically a First Amendment issue is not with the Defen-

dants, but may oppose them. See, Richmond Newspapers and discussion infra. Under Allen and Broaderick, and the sound policy of the foregoing decisions, this Court should not elevate the Defendants' summary allegations to constitutional significance, but rather should look to the record and the circumstances of this case.

B. In Russell v. Southard, 53 U.S. 12 (How.) 139, 158-159 (1851), the court stated the principle thus:

> "This Court must reverse or affirm upon the record."

This requirement is particularly applicable in the case at bar, revolving substantially upon a challenge to the impartiality of the jury and the fairness of the trial as it relates to publicity of the trial. See, Reynolds v. United States, 98 U.S. 244, 247 (1878). In Beck v. Washington, 369 U.S. 541, 558 (1962), the Court explained succinctly that:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' United States ex rel. Darey v. Handy, 351 U.S. 454, 462, 76 S.Ct. 965, 970, 100, L.Ed. 1331 (1956). This burden has not been met." [Emphasis added].

Accord, Irvin v. Dowd, 366 U.S. 717 (1961). The burden herein is therefore clearly upon the Defendants, not the State, to demonstrate actual prejudice. Murphy v. Florida, 421 U.S. 794, at 800-801 (1975); Irvin v. Dowd; Beck v. Washington, supra. There is no requirement that qualified jurors be totally ignorant of the facts and issues in a case. Murphy v. Florida, 421 U.S. at 800. Likewise, pretrial publicity, voluminous or otherwise, is also not in and of itself prejudicial. Nebraska Press Association v. Stuart, 427 U.S. 539, at 565-566 (1976); see, e.g., United States v. Haldeman, 559 F.2d 31 at 60, 62

n.37 (D.C. Cir. 1976), cert.den., 341 U.S. 933 (1977); United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), cert.den., 429 U.S. 1120 (1977); Calley v. Calloway, 519 F.2d 184 (5th Cir. 1975), cert.den., 425 U.S. 911 (1976); United States v. Mandell, 408 F.Supp. 673 (D.Md. 1975); 415 F.Supp. 1033 (D.Md. 1976); 431 F.Supp. 90 (D.Md. 1977). The Haldeman Court, observing the policy in Irvin v. Dowd, explains the fundamental analysis which must be forthcoming upon the claims in the case at bar:

> "Irvin established a 'common-sense standard' of juror qualification. United States v. Caldwell, 178 U.S.App.D.C. 20, 33, 543 F.2d 1333, 1346 (1974), cert. denied, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). In keeping with that approach, a defendant who claims he was denied a fair trial because the jury was not sufficiently 'indifferent' generally must sustain that claim 'not as a matter of speculation but as a demonstrable reality.' United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S.Ct. 865; 970, 100 L.Ed. 1331 (1956), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed.

> 268 (1942). This demonstration can be made only be reference to the voir dire." [Emphasis added, footnote ommitted]. 559 F.2d at 60.

Raw speculation is not enough. In Nebraska Press, this Court rejected the speculative analysis urged by the Defendants:

> "Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only 'a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial.' (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable." [Emphasis added]. 427 U.S. at 562-563.

Accordingly, in Irvin v. Dowd, relied upon by the Defendants for reversal herein, even in view of the publicity therein, the Court did not simply review the pretrial publicity and conclude that prejudice resulted. Rather, the court, "in-

dependently evaluate[d] the voir dire testimony of the impaneled jurors." See, 366 U.S. at 733.

In the case at bar, there is utterly nothing on the Record nor did the Defendants make any effort at a showing at any time of the kind or nature or extent of publicity or media coverage or any other facts showing actual prejudice. The Defendants also made absolutely no effort, as is their duty, to seek less stringent remedial measures, than exclusion of the camera and sequestration of the jury. See, American Bar Association Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press Standard 8-3.2 at 16 (Approved Draft 1978); see also, Nebraska Press v. Stuart, 427 U.S. 539, 562-565; Sheppard v. Maxwell, 384 U.S. 333, 354 n.9 and 358-362 (1966). The Record-on-Appeal clearly reflects a substantial voir dire.

R64-R205. None of the jurors was in anyway affected by the presence of a camera. See, A11-A12. The only prospective jurors who had even remotely heard of the case at bar, were ironically not excluded from the jury by the Defendants. R121-R122 (Burton); R132 (Callahan); R178 (Cook); R192 (Turner). None of the other jurors had ever heard of the case. Furthermore, none of the jurors had formed any opinion as to the guilt or innocence of the Defendants, unlike the extreme circumstances in Irvin v. Dowd, where two hundred and sixty eight (268) jurors were excused for cause, "as having fixed opinions as to the guilt of the [defendant]." 366 U.S. at 727. There is utterly nothing on this record to bring this case even remotely within the extraordinary and extreme examples, the Defendants rely upon. There is simply no showing on this record of a Sheppard "Roman Holiday"; or an Estes proceeding

"inherently lacking in due process"; or a showing as in Sheppard, of the lack of that "judicial serenity and calm to which [Sheppard] was entitled." 384 U.S. at 355; See, Goldman, J. and Larson, "News Camera in the Courtroom During State v. Solorzano: End to Estes Mandate?", 10 S.W.Nev.L.R. 2001, at 2011-2013 (1978). Similarly, Rideau v. Louisiana, 373 U.S. 723 (1963), is inapposite to the facts and circumstance herein. In Rideau, without examining the substantive record, the Court reversed the conviction and sentence of the defendant upon a finding of prejudice per se to the defendant in the trial court's refusal to grant a change of venue. 373 U.S. at 726. However, unlike the present circumstance, in Rideau, it was undisputed that the personal confession of the defendant had been presented to virtually all inhabitants of remote Calcasieu Parish, Louisiana, where the defendant was tried

and convicted. The Defendants in the case at bar, unlike Rideau, did not move for change of venue or dispute that they could not get a fair trial in Metropolitan Dade County, Florida and the Defendants cannot substantively dispute that the jury below, as impaneled, was fair and impartial. The rule of prejudice per se, under the unique circumstances of Rideau v. Louisiana, is not applicable to the facts in the case at bar. To the contrary, the Record herein affirmatively establishes that a fair impartial jury was not presented with and was unaffected at any time by any external influences [R74; R76; R121-R122; R132; R155; R178-R179; A12 (R183); R197]; that the jury was fairly and properly instructed [A13(R204); R204; A13(R349); A16-A17 (R653; R923)] and that the jurors were unaffected in their duty as jurors by the mere presence of a television camera [A9(R94-R95); A11(R141); A11(R168); A12(R182); A12 (R196)].

The Defendants have therefore failed in their burden to show the existence of actual prejudice, which affected the fairness of the trial and its participants or the impartiality of the jury. There is nothing on the record, but that the jurors' decision was based purely upon proper information received by them in open court. See, Chandler v. State, 366 So.2d 64 at 69.

C. Sub judice, the State submits that the Defendants seek to do here that which this Court has recently so decisively condemned in Richmond Newspapers v. Commonwealth of Virginia, __U.S.__, 48 U.S.L.W. 5008 (1980). Fundamentally, the Defendants claim, without any effort to show prejudice, that they have an absolute preemptive right to arbitrarily exclude the public at large through its "surrogate" the press. Recognizing that the courtroom could be literally jammed with members of the public, the De-

fendants apparently claim that they want a "public trial," but not "so public." Stated differently and in an historical context for emphasis, the Defendants contend that it is constitutional if some of the people in the 'village' of Miami view their trial, but that it is unconstitutional if all of the people in the 'village' of Miami view their trial. Of course, Miami is not a "village," but it is that proper historical analysis and context, which this Court applied in Richmond Newspapers, and which the State submits compels the same conclusion in the case at bar. In Richmond Newspapers, the parties had agreed to close a criminal trial arbitrarily, without any stated rationale except perhaps for a reference at an earlier hearing by the trial judge that the physical "layout" of the courtroom made, "having people in the courtroom. . . distracting to the jury." 48

U.S.L.W. at 5009. The Richmond Court rejected such arbitrary analysis and set forth the fundamental and overriding policy for public trials and public access to all trials in the face of arbitrary closure:

> "Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:
>
> 'Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks: as cloaks in reality, as checks only in appearance.' 1 J. Bentham. Rationale of Judicial Evidence 524 (1827).[7]
>
> * * *
>
> [7] Bentham also emphasized that open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public. Id., at 522-525." [Emphasis added].

48 U.S.L.W. at 5012.

See In Re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 132 Colo. 591,

296 P.2d 465 (1956); Hoyt, "Courtroom Coverage: The Effects of Being Televised," 21 J. Broadcasting 487, at 494-495 (1977); Weinstein, J. "Let the People Observe Their Courts," 61 Judicature 156 (1977); Nejelski, "Judging in a Democracy: The Tension of Popular Participation", 61 Judicature 166 (1977). The paramount value preserved by public attendance at trial is underscored by the court thus:

> "The nexus between openness, fairness, and the perception of fairness was not lost on [the English courts]:
> '[T]he judge, the counsel; and the jury, <u>are constantly exposed to public animadversion; and this greatly tends to augment the extraordinary confidence, which the English repose in the administration of justice</u>.' Goede, supra, at 215. [Emphasis not in original].
> "This observation raises the important point that'[t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect on the quality of testimony.' 6 J. Wigmore, Evidence § 1834, at p. 435. (Chadbourn re. 1976).[8] The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value.

Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

"When a shocking crime occurs, a community reaction of outrage and public protest often follows. See H. Weihofen, The Urge to Punish 130-131 (1956). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help,' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers. 'The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate[] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security, and, perhaps, to satisfy that latent 'urge to punish.'' Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U.Pa.L.Rev. 1,6 (1961).

"Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done——or even the urge for retribution. The crucial prophylactic aspects of the

> administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.' Supra, at——. It is not enough to say that results alone will satiate the natural community desire for 'satisfaction.' A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpectd outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process 'satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it." [Emphasis added].
>
> 48 U.S.L.W. at 5012.

The Richmond Court's analysis of the public function of the Courts and the public's right to observe justice, is a veritable primer on the essence of the criminal justice system. In delineating the essential qualities of a public trial, however, the Court also took judicial notice of the essential fact that the right of public observation of trials has drastically decayed as a consequence of the literal growth of

society beyond the capabilities of its members to attend, "the ancient, 'town meeting' form of trial." Id. Directly applicable to the present circumstance, the Richmond court then observed that in modern society:

> "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . .' Nebraska Press Assn. v. Stuart, 427 U.S. 539, 587 (BRENNAN, J., concurring)." [Emphasis added].
>
> Id., at 5012-5013.

The State submits that the fundamental historic value expressed by the Richmond Court must of necessity return to its original intended zenith where the public right of observation is revived by the presence

of its surrogate—the electronic media such that the public may actually see and hear for itself "the ancient town meeting form of trial" rather than relying solely upon the oral and written impressions of the trial by the print and electronic media[15]. See, Weinstein, supra;

---

15. As for example, in the Goldman Article noted above, "News Cameras in the Courtroom," 10 S.W.Nev.L.R. 2001, at 2012, n. 70-71, the "impressions" of the Sheppard case relayed to the public are described:

> '70. 384 U.S. at 338-43. The anti-Sheppard publicity continued unabated throughout the trial as both the police and press had long since concluded that it was an open-and-shut case as to the defendant's guilt. Id. at 345-49. But Who Will Speak for Marilyn? asked one newspaper headline. Another banner read: Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin to Testify. Id. at 346-48. What seemed to incense the local press was the fact that the Sheppard family was close-knit, wealthy and protective. The failure of the police to produce dramatic evidence as to Dr. Sheppard's guilt, and his steadfast claim as to his innocence, led the press to openly suggest that the defendant was literally getting away with murder. Id. at 338-42, 345-49.
>
> '71. Local newspaper editorials contained the following headlines: Why No Inquest: Do It Now, Dr. Gerber: Why Isn't Sam Sheppard in Jail?; Quit Stalling—Bring Him In. Id. at 339-41."

Miller and Wiggins, "Should Canon 35 be Amended?" 42 A.B.A.J. 834 (1956); Heflin, J. "Fair Trial vs. Free Press: Time for Rehearing?" 61 Judicature 154 (1977); Miller, "Public Confidence in the Judiciary; Some Notes and Reflections," 35 Law and Contem. Prob. 69, at 91-92, (1970); Wilson, "Justice in Living Color: The Case for Courtroom Television," 60 A.B.A.J. 294 (1974); see also, Note, "United States v. CBS: Where Sketch Artists are Allowed in the Courtroom, Can Photographers be far behind?" 1975 Duke L.J. 188. The Richmond Court in its final analysis did not distinguish between an arbitrary exclusion of the print and electronic media and an arbitrary exclusion of the public:

> "That the right to attend may be exercised by people less frequently today when information as to trials generally reaches them by way of print and electronic media in no way alters the basic right. Instead of relying on personal observation or reports from neighbors as in the

> past, most people receive information concerning trials through the media whose representatives 'are entitled to the same rights [to attend trials] as the general public.' Estes v. Texas, supra, at 540." [Emphasis added].
>
> Id., at 5014 n. 13.

Finally, consistent with the foregoing analysis at Points "A" and "B" above, the compelling reason for the implementation of the Richmond decision herein is expressed in the Court's concluding paragraph:

> "Having concluded there was a guaranteed right of the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. The Court in Gannett, supra, made clear that although the Sixth Amendment guarantees the accused a right to a public trial. 443 U.S., at 382. Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pre-

trial proceeding dealt with in Gannett, supra, there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. See, e.g., Nebraska Press Association v. Stuart, 427 U.S. at 563-565; Sheppard v. Maxwell, 384 U.S. at 357-362. There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. See Sheppard v. Maxwell, 384 U.S. at 359. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.18" [16.] [Emphasis added]. Id. at 5015.

---

16. At footnote 18, the Richmond court cautions that:

"We have an occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, cf., e.g., 6 J. Wigmore, Evidence § 1835 (Chadbourn rev. 1876) but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute."

The State however would expressly join in the alarm expressed by Mr. Justice

So too in the case at bar, the Defendants have erroneously sought an absolute right to exclude the public through its "surrogate" the electronic media without any Record showing that alternatives were inadequate. In reality, the substantial alternatives of voir dire, witness sequestration and cautionary instructions were entirely adequate in attaining a fair trial for Noel Chandler and Robert Granger. Where the disputed Rule, Florida Judicial Canon 3A(7), was so clearly constitutional as applied, the Defendants cannot lawfully complain of error. Con-

---

16. (cont'd.)Blackmun in his concurring opinion, that the court has "eschewed the Sixth Amendment," and set forth a "troublesome" "standard" and "strictness" of closure, 48 U.S.L.W. at 5021. The trial courts must retain unfettered discretion to properly control their courtrooms, subject to traditional concepts of appellate analysis. See, Gregg v. Georgia, 428 U.S. 153 (1976); Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 779 & 781 (Fla. 1979).

sistent with the analysis of the Richmond court and the decisions noted above at Points "A" and "B", the State Court convictions herein should be affirmed.

Second Issue

ESTES V. TEXAS, 381 U.S. 532 (1965), IS NOT A MANDATE FOR THE PROPOSITION THAT A CAMERA IN A COURTROOM IS UNCONSTITUTIONAL PER SE

The Defendants and the Amicus Curiae briefs rely heavily for their substantive analysis and even for the structure of their presentation upon the opinion of the Court in Estes v. Texas, 381 U.S. 532 (1965) (plurality). However, neither the opinion in Estes nor any decisions of this Court since Estes supports a per se ban upon a television camera's presence in a courtroom.

HISTORICAL ANALYSIS

A. The original prohibition against taking photographs and broadcasting in the courtroom was embodied in Canon 35, ABA Canons of Judicial Ethics. Warden,"Canon 35: Is there Room for Objectivity?" 4 Washburn L.J. 211 (1965) ("Of all the many

acts of the American Bar Association, the adoption and promotion of Canon 35 has been most controversial"). Canon 35 was the result of the "courtroom bedlam" and excessive publicity which inundated the trial of Bruno Hauptmann for the kidnapping of the Lindbergh baby [17]. See, Kielbowiez, "The Story Behind the Adoption of the Ban on Courtroom Cameras", 63 Judicature 14 (1979); Note, "Cameras in the Courtroom: A Denial of Due Process?," 30 Baylor L.R. 852 (1978). The Hauptman trial was broadcast by radio and featured photographers leaping about like acrobats, witnesses tripping over cables and broadcasting equipment and a constant traffic of messengers to the media. See, State v. Hauptman, 180 A. 809 at 827-828. Doubles, supra, Note 17

---

17. See, State v. Hauptman, 115 N.J. 412, 180 A. 809 (1935), cert.den., 296 U.S. 649 (1935); Doubles, "A Camera in the Courtroom," 22 Wash. and Lee L.Rev. 1 (1965)

at 2. Throughout the trial, the courtroom was also crowded with spectators who displayed frequent outbursts of approval, censure and even applause at the testimony of witnesses. Hauptman, 180 A. 809, 827-828. In a hurried effort to prevent additional occurrences in the nature of the Hauptman trial, the ABA acted swiftly, setting a special committee to investigate the Hauptman trial and the "Baker Committee" to propose regulations. See, Kielbowicz, 63 Judicature 14, at 20-21. The ABA House of Delegates heard the report on September 27, 1937, and resolved "that the committee report be approved to the extent that it has been concurred in by the three groups; and that the committee be continued for the purpose of obtaining, if possible, an agreement of the three groups concerned." A.B.A. Rep. 240 (1937) quoted in Hollam,

Some Object Lessons on Publicity in Criminal Trials, 24 Minn.L.Rev. 453, 464 (1940). Three days later, on September 30, 1937, through an "unfortunate lack of coordination" (Id. at 465), the House of Delegates passed Canon 35 with a number of other amendments to the Canons and Professional and Judicial Ethics submitted by the Professional Ethics and Grievances Committee. Canon 35 was passed without a reading, without discussion, and without reference to the need for further study announced three days earlier. Kielbowicz, 63 Judicature 14 at 22. The evils attributed to media activities in the courtroom were not derived from any empirical study of media behavior during trials nor from any research whatsoever except for the Hauptman trial. Id; see, Blasfield, "The case of the Controversial Canon," 48 A.B.A.J. 429 (1962), Warden, "Canon 35: Is there Room for Objecti-

vity?," 4 Washburn L.J. 211, 230-231 (1965); see also, In Re Mark, 386 Pa. 251, 126 A.2d 679 at 694 (1956). In 1938 a report by a joint committee of the ABA expressed the belief that the new Canon was impractical and that the ABA acted too hastily in its passage. Blasfield, 48 A.B.A.J. 429 at 430.

The original Canon 35 gave three (3) reasons to exclude the media:

> "Improper Publicizing of Court Proceedings. Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated [1] to detract from the essential dignity of the proceedings, [2] distract the participants and witness in giving his testimony, [3] degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

In 1952 Canon 35 was amended to add a fourth reason, that media access would, "distract the witness in giving his

testimony." 77 A.B.A. Rep. 110 (1952). An exception was also added for naturalization, "for the purpose of publicly demonstrating in an impressive manner the essential dignity and serious nature of naturalization." Thus, a camera at a naturalization proceeding will convey dignity but at a trial it is "calculated to detract from the essential dignity."[18] In 1972, the Code of Judicial Conduct replaced the Canons of Judicial Ethics and Canon 3A(7) superseded Canon 35. The Special Committee on Standards of Judicial Conduct which drafted the Code seriously doubted the propriety of treating media access as an ethical question. See, Thode, Reporters Notes to Code of Judicial Conduct, 57 (1973). In 1978, both the ABA Standing Committee on Association Standards for Criminal Justice

---

18 The phrases "calculated to" and "degrade the court" were dropped in 1963 88 A.B.A. Rep. 117 (1963).

and the ABA Committee on Criminal Justice recommended approval[19] of Standard 8-3.6(a) of the American Bar Association Standards Relating to the Administration of Criminal Justice 2d Ed. (Tentative Draft 1978), which provides inter alia that:

"Standard 8-3.6. Conduct of the trial

"The following standards govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial materials are raised.

(a) Use of the courtroom

Whenever appropriate, in view of the notoriety of a case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignement of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding. Television, radio, and photographic coverage of judicial proceedings is not per se inconsistent with the right to a fair trial. Subject to conditions and restrictions established by local rule

---

19. See, Whisenand, "Cameras and Courtrooms: Fair Trial-Free Press Standards" 52 Fla.Bar.J. 456 (1978).

> or by agreement with representatives of the news media, such coverage should be permitted if the court in the exercise of sound discretion concludes that it can be conducted unobtrusively and without distracting the attention of trial participants."

This proposed Standard was apparently defeated by a voice vote on February 12, 1979. The ideas incorporated in Canon 35 were applied to the Federal Court System on March 12, 1962, by a resolution of the Judicical Conference of the United States. This resolution effectively banned cameras from all Federal Courts, although the individual states were left free to regulate their own court systems. The Florida Supreme Court originally adopted the Canon in an order entered on January 27, 1941. See, "Judicial Canon 35: Revise or Retain," 37 Fla.B.J. 16 (1963).

Despite the ABA position announced in 1937, several states in reported decisions declined to follow a per se rule[20]. In

---

20. See, Goldman, 10 S.W.Nev.L.R. 2001, at 2014-2020.

1956, the Colorado Supreme Court held several days of public hearings to consider whether the canon excluding still and electronic media from the courtroom should be continued, revoked or modified. In re Hearings Concerning Canon 35, 132 Colo. 591, 296 P.2d 465 (Colo. 1956). Chief Justice Moore candidly admitted that his initial position was against television and other cameras. Id. at 468. However, after six days of testimony and expert demonstrations, Justice Moore overcame his expressed bias. He concluded that the premise of Canon 35, which assumed that camera, radio and television instruments inherently interfere with the administration of justice, was utterly unfounded. Reiterating, the Chief Justice commented that the hearing "proved conclusively that the assumption of facts as stated in the Canon is wholly without support in reality," and that each of the arguments submitted in

support of the prohibition were faulty. Id. at 468. The Colorado Supreme Court addressed and rejected some of the arguments for a per se rule thus:

> "It is claimed that permitting photographs, newsreels, radio and telecasts of court proceedings amounts to entering the field of entertainment and is not strictly within the field covered by the term 'freedom of the press.' The Supreme Court of the United States has held otherwise. [Citing] the opinion in Winters v. People of Sttae of New York, 333 U.S. 507, 68 S.Ct. 665, 667, 92 L.Ed. 840,
>
> * * *
>
> "Closely related to the foregoing is the argument that coverage of court proceedings going beyond the inaccurate word pictures pained with the pen of the courtroom press reporter, would be merely to satisfy "idle curiosity" for entertainment purposes. The contention overlooks the obvious fact that under our concept of government there is a constant regard for the necessity of educating and informing our people concerning the proper functioning of all three branches of government. <u>There is no field of governmental activity concerning which the people are as poorly informed as the field occupied by the judiciary</u>.
>
> "It is highly inconsistent to complain of the ignorance and apathy of voters and then to 'close the windows of information through which they might observe and learn.'"
>
> . . .

> "It is contended, usually orally and in smothered words or whispers, that some trial judges, and lawyers 'who are hungry for publicity, will conclude that they are actors, and by some psychological motivation 'play to the galleries' and so conduct themselves as to satisfy their own vanity, or otherwise exploit themselves.'
>
> Any judge or lawyer who so demeans himself before a camera does not change his inherent characteristics for that particular occasion. A "show-off" or a "strutter" will be just that whether a camera is present or not."

296 P.2d at 469.

See also, Hall, J., "Colorado's Six Years Experience Without Judicial Canon 35," 48 A.B.A.J. 1120 (1962). Justice Hall of the Colorado Supreme explained the actual experience of Colorado with televised trials noting the sensational murder trial of John Graham, who bombed an airliner:

> "One may view and hear this telecast without a consciousness of degradation or distraction——for certainly it gives a true picture of the persons and things viewed and a true record of the voices and sounds. Truth is not per se objectionable. One can find nothing (and I have heard of nothing) indicating that there was a particle of detraction from the essential dignity of the proceedings. Nothing appears therein to indicate that any

> witness was distracted in giving testimony——no witness has been heard to complain. Did this telecast degrade the court? Those participating in the proceedings might well demand proof of such charges. The visual and auditory recording speaks the truth: it shows a competent judge and prosecuting attorney; competent defense counsel; witnesses; and a jury charged with a frightening task, all concerned with their public duties in an orderly, dignified, efficient and legal manner. Did it create misconceptions with respect to the court? Only true conceptions could arise from viewing the telecast. If misconceptions arose, they had their root in other sources. the telecast spoke the truth. "[Emphasis added].
>
> 48 A.B.A.J. 1120 at 1121.

In Lyles v. State, 330 P.2d 734 (Okla. 1958), the Court of Appeals affirmed a burglary conviction against a claim that the trial judge had abused his discretion in permitting a television camera in the courtroom over the defendant's objection. Id. at 738-744. Specifically, the Lyles court rejected the defendant's contention that a television camera interfered with and degraded court proceedings:

> "Our experience is that when properly supervised by this court, there is neither disturbance, distraction, nor lack of dignity or decorum."
>
> 330 P.2d at 742.

The Lyles Court directly rejected the defendants rank speculation as to error as:

> "[B]aseless boogey constructed out of pure conjecture. . . [T]he presumption upon which Canon 35 has been constructed is fabricated out of sheer implication and not hammered on the anvil of experience." Id.

With respect to potential abuses the Lyles Court correctly observed:

> "[W]hen abuses of discretion [of the trial court] occur, we will meet them on appeal and not in a manner of preconception and on a basis of unrealistic presumption."
>
> Id. at 745.

Finally, mirroring the deep concern of the Colorado Supreme Court, the Lyles Court also opined:

> "All too long the public concept of courtroom proceedings and demeanor has been the antiquated or distorted motion picture portrayals. It is time the people were shown the truth about their courts. How can the people have respect

> for that branch of government concerning which they grope in ignorance and the only knowledge they possess about it is based on distortions and misrepresentations?"

Id. at 743.

Similarly, in State v. Langley, 214 Ore. 445, 323 P.2d 301 (Ore. 1958), the court admonished a trial judge for allowing still and movie cameras in the courtroom in derogation of Canons 34 and 35. Nevertheless, the denial of defendant's motion for a new trial based on alleged prejudice was held not to be reversible error. It was noted that the question of the permissibility of photographers in court "cannot be determined as one either of constitutional law or of policy" but rather whether the jury was influenced adversely. 323 P.2d at 320.

This Court has rendered only two decisions, where a television camera was present, Stroble v. California 343 U.S. 181 (1952) and Estes v. Texas, 381 U.S. 532

(1965). In Stroble the defendant was convicted of a sensational rape/murder of a young child. See, People v. Stroble, 36 Cal.2d 615, 226 P.2d 330 (1951). The crime, arrest, and trial generated a great deal of sensationalized newspaper, radio, and television publicity with the district attorney releasing "play-by-play" press releases. The California Legislature was convened in special session by the governor and it held committee hearings in various parts of California to study the problems of sex crimes. The defendant unsuccessfully contended, in the trial court, that he could not receive a fair trial due to the prejudicial publicity that had created a "lynch atmosphere." He also objected, at various times, to the presence of television and still photography cameras in the courtroom. The California Supreme Court rejected the defendant's claims, observing that:

> "It seems that the traditional concept of the 'American way of the conduct of a trial,' particularly a trial for a sordid criminal offense such as that of defendant, includes both the aspects mentioned so understandingly by Mr. Hill: on the one hand over-stimulation, by mass media of communication, of the usual public interest in that which is gruesome; on the other hand a trial by a judge and jury immune from the public passion. General denunciations of the journalistic sensationalism which customarily surrounds a trial such as that of defendant, and which did surround defendant's trial, do not solve the question whether defendant's trial was fair. We may agree with defendant that it was improper for the district attorney to issue 'play-by-play bulletins' during the course of defendant's confession. But there is no indication that the jury, two months after the improper statements were made and immediately after hearing evidence, based their verdict on the newspaper accounts of the statements rather than upon the evidence. We can also assume that it was improper to allow the taking of news photographs or televising of scenes in the courtroom; but there is no indication that the jury's verdict was influenced by the taking of the pictures or the televising of courtroom scenes." [Emphasis added].
>
> 226 P.2d at 334.

The United States Supreme Court affirmed the defendants conviction in Stroble v.

California, 343 U.S. 181 (1952)[21]. The majority did not grant this camera contention any recognition but Justice Frankfurter discussed it in his dissenting opinion. 343 U.S. at 200.

In Estes, Justice Clark writing for the plurality[22] noted that the petitioner, "does not contend that we should enshrine Canon 35 in the Fourteenth Amendment, but

---

[21] Directly relevant to the case at bar and the discussion at the "First Issue" above, Stroble was cited with approval in Estes v. Texas, 381 U.S. 532, 541 (1965) and Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 722 (1976); although the pre-trial and trial publicity and not a camera issue was discussed. The Chief Justice, in Nebraska Press, expressed the majority's view by describing the Stroble decision as holding "that petitioner had failed to demonstrate a denial of due process." 427 U.S. at 554. [Emphasis added].

[22] Justice Clark was joined by Justices Warren, Douglas and Goldberg. Justice Harlan, concured in this opinion subject to the reservations and to the extent indicated in his concurring opinion. The Chief Justice, with Justices Douglas and Goldberg, also filed a separate opinion expressing the view that cameras in the

only that the time-honored principles of a fair trial were not followed in his case." The Court characterized the issue:

> "[T]he question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment." [23]

381 U.S. at 535.

The defendant, Estes, was a much-publicized financier indicted for obtaining property through false pretenses. Id. at 552. Massive pretrial publicity (totalling eleven volumes of press clippings) required a change of venue. Id. at 535. The initial hearings in September of 1962 were carried live by both radio and television[24]. Justice Clark, who delivered

---

[22](cont'd.) state courtrooms violated the Fourteenth Amendment, U.S. Constitution. 381 U.S. at 565.

[23]Canon 28 of the State Bar of Texas left the presence of cameras to the discretion of the trial judge.

[24]Unlike the case at bar.

the plurality opinion in Estes, reviewed video-tape[25] of the pretrial hearings and commented: "[T]he picture presented was not one of that judicial serenity and calm to which petitioner was entitled." Id. at 536. The cameras at the pretrial hearings were essentially unregulated. Cables and wires were snaked across the courtroom floor, three microphones were propped up on the judge's bench and others were aimed at the jury box and counsel table. Id. at 536. As pointed out by Justice Clark, it was conceded that the activities by the media personnel, cameramen, and photographers "led to considerable disruption of pretrial hearings." Id. at 536. Apparently photographers were roaming at will and one photographer snapped a picture from behind the judge's bench. Id. at 536. At trial,

---

25. The Supreme Court of Florida in rendering its opinion in Post-News was also presented with the video-tapes of the Estes trial for its consideration.

however, the cameras were confined to a booth at the rear of the courtroom. Id. at 537 and 581 (photograph); see also, Netteburg, "Does Research Support the Estes ban on Cameras in the Courtroom?" 63 Judicature 466 (1980). During the trial itself, live sound television coverage was limited to opening and closing arguments of the prosecution and the return of the jury verdict; no witnesses were photographed without their consent; the jury was sequestered and there was no supplemental lighting. 381 U.S. at 607-609 (Stewart, J. dissenting). Justice Stewart in his dissent and joined by Justices, Black, Brennan and White severely criticized the majority for elevating hypothetical complaints to levels of constitutional error and for focusing upon the essentially irrelevant pretrial hearings. 381 U.S. at 601-610. Relevant to the present circumstances Justice Stewart concluded:

> "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." [Emphasis added]. Id. at 614-615.

It is significant to note that, despite the plurality's graphic portrayal of the courtroom scenario, only three justices, Warren, Douglas, and Goldberg, would join without reservation in the opinion of Justice Clark. A bare majority of the Court was created by the concurrence of Justice Harlan, who specifically limited the Court's opinion, thus:

> "The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases... The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes not farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now." [Emphasis added]. 381 U.S. at 590-591.

Both the Court opinion and Justice Harlan further recognized the limited application of Estes. Justice Clark specially noted:

> "When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."[26] 381 U.S. at 540.

Justice Clark also concluded that:

> "It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are

---

26. Technology has far exceeded the expectations of 1962 to a point where even the defendants (Br. p.38) and the most vocal critics of television in the courtroom concede television cameras are no longer "physically" obtrusive and distracting. See, Gerbner, "Trial by Television: Are We at the Point of No Return?," 63 Judicature 416 at 417 (1980); see also, Broholm, "Electronic Media in the Courtroom," May-Case and Comment 3 at p.6 (1980) (describing technology) and Brief of Amicus Curiae, Public Broadcasting System, et al. Obviously here we do have "another case" where the record is utterly devoid of the presence of the media, except for defense counsel's announcement and one cautionary warning to a cameraman outside the presence of the jury. A15.

> not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today."

Id. at 551-552.

Finally it should be also noted that Justice Brennan in a specially written opinion at the conclusion of Estes, reiterated Justice Harlan's cautionary view above, and added that:

> "Thus today's decision is not a blanket constitutional prohibition against the televising of state criminal trials." [Emphasis supplied].

381 U.S. at 617.

Indeed, Estes has not been recognized in any of this Court's opinions as a mandate precluding a camera from a courtroom. In the eight-to-one majority view in Sheppard v. Maxwell, 384 U.S. 333, 352 (1966) the court described Estes as a fact pattern in which the "totality of circumstances" produced an unconstitutional trial. The same limited reading of Estes was expressed in Murphy v. Florida, 421

U.S. 794 at 798 (1975), as, "a state court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage." In Nebraska Press v. Stuart, 427 U.S. 539, 552 (1976), the Court limited Estes to its facts:

> "[I]n Estes, the Court held that the defendant had not been afforded due process where the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself 'inherently prevented a sober search for the truth.'" [Emphasis added].

Subsequent State Court opinions have also specifically taken the view that Estes is limited to its facts. See, Post-Newsweek, supra; Commonwealth v. Hayes, __Pa.__ 414 A.2d 318, 335 (Pa. 1980) (Kauffman, J. concurring); Willard v. State, 400 N.E.2d 151, at 157-158 (Ind. 1980)(burden is on defendant; voir dire is the measure); Great Falls Tribune v. District Court, __P.2d__(Mont. 1980); S.Ct. Case No. 79-93, opinion filed March

19, 1980; State v. Cline, 555 P.2d 724, 734 (Mont. 1976); Street v. State, 237 Ga. 307 (1976); Commonwealth v. Martin, 465 Pa. 134 (1975); State v. Schmid, 109 Ariz. 349, 509 P.2d 619, 623 (1973); Wansley v. Commonwealth, 210 Va. 462 (1970); Bradley v. Texas, 450 S.W.2d 847 at 853 (Tex,Cr.App. 1970); State v. Hagan, 24 N.Y.2d 395 (1969); Gonzales v. People, 165 Colo. 322, 438 P.2d 686 (1968). Furthermore, since February 1976 more than twenty-eight (28) states have allowed some sort of audio-visual coverage of their court proceedings. AB5-AB9; see also, Br. of Amicus Curiae RTNDA, et al., at notes 40-44. Additionally, as the amicus curiae RTNDA indicates at least twelve other states are actively studying allowing some sort of audio-visual coverage of their Courtrooms. Id., at note 44. Thirteen (13) states do not condition coverage upon the

defendant's consent[27]. Id. at note 47. The State submits that in the final analysis the ongoing efforts of the vase majority of the states, together with a proper reading of Estes and this Court's own opinions, affirmatively demonstrate the view that Estes is not a mandate against the mere presence of a camera in a courtroom. It would also appear self-evident that in the final analysis, in the face of the foregoing substantive law and the decided disregard of the states that:

> "Enacted in a time of apparent crisis, Canon 35 now appears to have been an exaggerated response to an exceptional situation."
>
> Keilbowicz, 63 Judicature, 14, at 20.

---

27. Colorado, it should be noted, added a consent requirement to its Canon, only in deference to the court in Estes. See, Note "Free Press-Fair Trial-Cameras in the Courtroom," 38 U.Colo.L.R. 276, at 278 (1966). The same deference resulted in one state, California, withdrawing its experimental program, when this court accepted the case herein for review. New York and Oregon have also apparently followed suit. See, Brief of RTNDA, et al., at Appendix A.

PETITION OF POST-NEWSWEEK

B. Consistent with the foregoing analysis that Estes is not a ban per se upon a camera or other electronic media in a courtroom, on May 21, 1975, the Supreme Court of Florida partially granted a petition by the Post-Newsweek stations of Florida. The stations had petitioned the court to adopt a substitute for Canon 3A(7) of the state's Code of Judicial Conduct, which required that a judge in keeping with his adjudicative responsibility, prohibit the broadcasting, televising, recording and photographing of judicial proceedings in courtroom except in certain specified circumstances. The court declined to adopt the substitute but it agreed to reexamine the canon and consider modification. See, Petition of Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla. 1976).

On January 28, 1976, the Court entered

its formal opinion, after an earlier conference attended by "all interested parties," authorizing Judge Willis, the Chief trial judge in the Second Judicial Circuit, to proceed with a televised trial under specific limited guidelines. 327 So.2d at 2. Specifically, the court's order required the consent of all of the parties, jurors and witnesses. On September 17, 1976, Judge Willis reported that he was having difficulty obtaining the required consents of the parties. The Court's order was thereupon expanded to the Ninth Judicial Circuit. 337 So. 2d 804 (Fla. 1976). Subsequently, by supplemental order the plan was expanded to the Fourth and Eighth Circuits. See, 370 So.2d at 766.

On April 7, 1977, when the consent of all participants proved to be an unworkable standard, the court addressed the issue again, concluding that a thorough

experimental program was, "essential to a reasoned decision upon the petition." 347 So.2d 402 at 403 (Fla. 1977). The Court thereupon proposed to enter upon a pilot program. Id. On May 21, 1977, an extensive conference was conducted by the Court, at which all interested parties participated. 347 So.2d 404 (Fla. 1977). On June 14, 1977, after more than two (2) years of deliberation, the court instituted a one year pilot program from 12:01 A.M. July 5, 1977 to 11:59 P.M. June 30, 1978 [28]; during which the elec-

---

[28] During this period, the Defendants, Chandler and Granger were tried and convicted. The publicity surrounding their trial was negligible. See, The Miami Herald "Ham Hears Burglary, Two Officers Arrested," July 2, 1977, P. 1A; The Miami News, "Beach Policemen Charged with Burglary," July 2, 1977, P.1A; The Miami News, "Trial Date Set for Two Beach Policemen," July 20, 1977, P. 1B; The Miami Herald, "Beach Cops Staged Break-In 'as joke'," November 18, 1977. P.ID; The Miami Herald, "Radio Enthusiast Unsure of Date he Heard Cops," December 7, 1977, P.1A; The Miami Herald, "Wives of Beach Cops Testify," December 8, 1977, P. 1B.

tronic media were afforded access to Florida courtrooms under strict guidelines. See, 347 So.2d at 405-406. Relevant to the case at bar, the guidelines limited the trial of any cause to one fixed position television "minicam" and one fixed position still photographer. Id., See also, Administrative Order 79-31, presenly in effect for Courtroom 4-4, in the case at bar (AA 34 - AA 36); The News and The Law, "TV in Court: Seven States approve," (Dec. 1977) pp. 24-25, (Diagram of Zamora courtroom). The strict standards also excluded any artificial light sources; excluded any equipment except that examined and listed by the Court and excluded any audio pick-up of bench conferences, or between attorneys and clients. Id. All other equipment other than the one fixed "minicam" and one still photograph were restricted to a remote

location from the courtroom [29]. Id. The Florida Supreme Court specifically instructed that the trial judge was not to be presented or consulted on any media disputes; that contesting media shall be excluded and that all equipment once in place shall not be moved. Id. On May 11, 1978, the Court accelerated the briefing schedule and denied an extension of the pilot program beyond the one (1) year deadline. 358 So.2d 1360 (Fla. 1978). The remarks of Chief Justice Overton and Justice Boyd are illuminating:

"[Justice Overton]:

> I concur in provisions in the majority opinion that set forth the procedure for the presentation of all views evaluating the pilot program. I dissent on that portion of the order that denies the request to extend the pilot period until September 15, 1978. There have been no substantial problems presented

---

[29] See, Tello, "The Zamora Trial Makes TV History," Lighting Dimensions (March 1978) pp 39-40 (media liaison official for Zamora trial).

to this Court with regard to the pilot program. In view of this fact, I see no justification for not extending the pilot program to a time certain within which a final opinion may be rendered by this Court."

. . .

"[Justice Boyd]:

"I further dissent to that portion of the order terminating the experiment on June 30, 1978. Responses which I have heard from judges and lawyers thus far lead me to conclude that the public will be beneficially affected by continuing the program indefinitely pending review by this Court. After one calendar year judges, lawyers, jurors, witnesses, news reporters and the viewing public have grown accustomed to cameras in court. The temporary termination of such activity, with the probability of its renewal within a few weeks, would tend to disrupt and frustrate the program which at this time appears to be generally accepted in this State." [Emphasis added]

Id., at 1361-1362.

On April 12, 1979, the Court in Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), held inter alia, (1) that electronic media coverage of courtroom proceedings is not per se a denial of due process; (2) that subject to the express modification of

Florida Judicial Canon 3A(7) and the attached guidelines, camera coverage would be allowed; and (3) that the order of the Court was not pursuant to the First Amendment, but was based upon the administrative and supervisory powers of the Court. The decision of the Court was only made after extensive examination of Estes and Stroble, supra, and due consideration of the present state of the issue[30]. See, 370 So.2d at 766 (thousands of comments, reports and exhibits considered). The Supreme Court of Florida observed that in Justice Harlan's view in Estes, further experimentation by the states was neces-

---

[30]The State submits that the proper issue herein is only whether Chandler and Granger received a fair trial on this record. However, inasmuch as both the defendants and the Amicus Curiae on behalf of the defendants make substantial incomplete references to the record in Post-Newsweek, the State has by motion obtained the permission of the Supreme Court of Florida to lodge said record with this Court, subject to the Court's approval.

sary; that the Estes Court acknowledged that advances in technology could make a new case; that in the Estes case twelve (12) cameras were in use at one point in the proceeding; that Justice Clark declined to enshrine Canon 35 in the Fourteenth Amendment; that eighteen (18) states were pursuing either a permanent or experimental rule permitting media in the courts, and finally that recent decisions of the court in Sheppard, Nebraska Press and Murphy v. Florida, limit Estes to its facts. See, 370 So.2d at 771-773. As demonstrated in the discussion above the Florida Supreme Court's reasoning is sound.

In considering the record before it, the Florida Supreme Court addressed several aspects of the Post-Newsweek record: 1.) a survey conducted the Judicial Planning Coordination Unit of the Office of the State Courts Administrator (here-

inafter, "the survey") [31]; 2.) a survey and report by the Florida Conference of Circuit Judges, and 3.) reports of actual trials, including an extensive report by Judge Paul Baker regarding the Zamora trial [32], 270 So.2d at 766-770, 775 n. 48. The Defendants attempt in post hoc fashion to attack their own conviction by relying almost exclusively upon an extensive attack upon "the survey." The Defendants, accuse the Supreme Court of Florida of acting "so cavalierly" (Br. P57); claim that the survey "reeked of

---

[31] The Defendants made extensive partial reference to the survey, which is correctly titled: "A Sample Survey of the Attitudes of Individuals Associated With Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978.

For the convenience of the Court, the State has provided the factual data of the entire survey in its Appendix at AA37 - AA69.

[32] The entire text of Judge Baker's report is contained in the State's Appendix at AA1 - AA33.

personal guess-work" (Br. p. 49) and finally claim that the survey is "in house" and "hardly scientific" (Br. pp. 47-48). First of all, the State submits that "the survey" was not the sole and motivating basis for the Supreme Court's decision as clearly reflected in the opinion in Post-Newsweek. Secondly, the Court itself expressly recognized that the survey was not scientific:

> "Mindful that the survey results are non-scientific and reflect only the respondents' attitudes and perceptions about the presence of electronic media in the courtroom, nonetheless, the results do provide some general indications:"
>
> 370 So.2d at 768.

While extensive reference to the Court's observations are impractical here, certain of the findings are particularly illuminating:

> "(1)Presence of the electronic media in the courtroom had little effect upon respondents' perception of the judiciary and the dignity of the proceedings.
>
> . . .

"(4) The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all. The ability of jurors to concentrate on the testimony was similarly unaffected.

. . .

"(8) The distracting effect of electronic media was deemed to range from almost not at all for jurors, to slightly for witnesses and attorneys.

. . .

"(15) Court personnel and attorneys were of the attitude that the presence of electronic media affected the flamboyancy of witnesses to a degree between not at all and slightly.

"(16) They also felt that the witnesses were slightly inhibited by the presence of electronic media and that jurors were made slightly self-conscious, nervous, and distracted, but also slightly more attentive." [Footnotes omitted].

Id., at 768-769.

The court concluded that:

"From our own experience with electronic coverage of oral arguments before this Court during the pilot program we found absolutely no adverse effect upon the participants' performance or the decorum of the proceedings."

Id., at 769.

Sub Judice, the Defendants attempt to

distort the survey by combining entire sections of figures and reordering the responses. See, Brief of Amicus Curiae Post-Newsweek. The control questions in the survey and the entire survey itself refute the attempt of the Defendants by manipulation to disprove that which the figures plainly show.

With respect to the Florida Conference of Circuit Judges, which submitted a recommendation that Canon 3A(7) not be changed, the Court perceived that the opposition was more traditional rather than of substance:

> "The circuit judge under whose direction the survey was administered reported that "the neutrals generally made favorable comments as 'I am neutral but the press were professional, no disturbances, etc.'" In response to questions 6, 7, and 8 of the survey, it was the reaction of the circuit judges (90 to95%) that jurors, witnesses, and lawyers were not affected in the performance of their sworn duty by the presence of electronic media." [Footnotes omitted].

Id., at 769-770.

The court also substantiated its view, noting the conclusion of the survey:

> "As stated by Circuit Judge Arthur J. Franza in his survey recapitulation and analysis:
>
> From the whole, I think Courts do not object to use of cameras in the courtroom now that they have had some experience. However, in certain areas some Judges have strong opinions. Paramount being:
>
> 1. That the presiding Judge have control of his courtroom.
>
> 2. That confidential or undercover agents who are witnesses, victims of crimes, family especially children of the convicted, and juvenile proceedings not be photographed." [Footnote ommitted][33].

The Defendants' criticism of Post-Newsweek relying upon the Conference of Circuit Judges Report is indeed a hollow argument.

In the final analysis, actual experience was the substantive basis of the well-reasoned opinion in Post-Newsweek and

---

[33] The Supreme Court of Florida concurred in these concerns. See, 370 So.2d 778-779. The State would also vigorously support these concerns. See, discussion at footnote 16, supra, see also, Richmond Newspapers, (Blackmun, J. concurring).

is the overwhelming and compelling reason to permit electronic media access to trial courtrooms. See, also, "Report to the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom", (April 1, 1979), (referring at pp. 26, 19, 30 and Appendix I, that jurors were not distracted, nor did a camera's presence have any affect upon their functioning as jurors) hereinafter the "Wisconsin report"[34]; Goldman 10 S.W. Nev.L.R. 2001, at 2014-2059 (Soleranzo experiment in Nevada: jury foreman states that filming of trial had no effect upon jury); Humphries, "Report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom,"

---

[34]. The Wisconsin, Louisiana and Washington Reports have been lodged with the Court by the Amicus Curiae, Wisconsin et al. whose brief also contains a thorough analysis which the State commends to this Court, of the experience of Wisconsin as compared to Florida, Nevada, Louisiana, Georgia, Alabama, Washington, New York and Colorado.

pp. 2,3 (undated)(Louisiana Study: jurors unaffected by presence of camera and did not attach more importance to case); "Washington Bench-Bar-Press Committee, Report of SubCommittee on Canon 35" p. 33 April 5, 1975) [hereinafter the Washington Report]; Netteberg, 63 Judicature 467 at 467-472. In the four (4) areas of particular concern to the Estes court, physical disruption; psychological effect; exploitation of the courts[35]. and prejudical publicity; the Court found no evidence in its experience to

---

35. Commercial exploitation of the courts is a hollow argument in view of the advent of the Public Broadcasting System, a result that the Estes Court could not have foreseen. In Florida substantially all trials have been carried exclusively by PBS with other stations using footage. See, Brief of P.B.S., et al. These trials and excerpts only constitute a handful of the more than 24,000 trials in Metropolitan Dade County in 1979 alone. This underscores a final point: -- the media are not clamoring at the courtroom door to get in. They too are severely constrained by time and other audience interests. See, Brief of Post-Newsweek.

support the fears expressed. Id., at 775-777; see also, e.g., Wisconsin Report; Hall, 48 A.B.A.J. 1120 at 1121; Goldman, 10 S.W. Nev.L.R. 2201; Netteburg, "Does Research Support the Estes ban on Cameras in the Courtroom?" 63 Judicature 466 (1980). With respect to physical disturbances, the Court explained that:

> "After sifting through the voluminous arguments, comments, survey results, and concessions of the opponents, it is apparent that through application and enforcement of the standards imposed by the Court during the pilot program, physical disturbance was so minimal as not to be an arguable factor." [Emphasis added, Footnotes Omitted].
>
> Id., at 775.

The trial courts also reported no instances of being "burdened" by the presence of electronic media. Id. With respect to decorum, the Court observed:

> "A related issue is whether the very presence of electronic media in the courtroom detracts from the decorum of the proceedings. The attitudes of

> all participants surveyed clearly indicate that there is no such discernible effect."

Id.

As the Estes Court envisioned, the advances in technology have clearly produced "another case" [36]. Although the Defendants concede this issue, the State would specially emphasize that the lack of physical intrusiveness of a camera is an important factor. The simple reason is that where the camera is so physically minimally intrusive, "as not to be an arguable factor," as a matter of common sense, the so called "psychological distraction," attributable to the camera must be substantially nil. See, Wilson "Justice in Living Color," 60 A.B.A.J.

---

[36] In addition to other technological advancements, (See, Broholm, "Case and Comment, supra; Brief of P.B.S., et al), the state would also note that the "tell-tale red lights" noted in Estes, 381 U.S. at 546, are not present in Florida courtrooms using the equipment designated. See, Baker Report, at AA19; See also, Report of Channel 2 [Post-Newsweek Record].

294 at 296 (1974) ("psychological consciousness" soon forgotten when camera is not obtrusive); Geis, "Canon 35 in the Light of Recent Events," 43 A.B.A.J. 420 (1957). (In Waco, Texas trial "coughing in spectator section " was more distracting than cameras); Netteburg, 63 Judicature 466 at 470 (Witnesses in Wisconsin study more nervous about responding to attorneys than cameras; soon forgot about camera's presence; perception of camera no different than other media). A salient point, which the undersigned submits we all miss as legal scholars and trial wizards, is that for the jurors and witnesses, the entire spectrum of a legal proceeding from the columns of mahogany and the frescos behind the judge, to the pecking or dictating-cone-to-face of the court reporter, is both new and physically and psychologically distracting. Only the attorneys and the judge may

know that the camera is something different. A poignant example of that misconception is demonstrated in the Washington Report, where, when asked if they were distracted, many jurors indicated that they didn't know that the camera was something unusual in the courtroom. In the Wisconsin Report, the jurors also indicated that they were too absorbed in the trial and listening to the testimony to pay any attention to being televised.

Similarly, in examining claims that lawyers would "grandstand;" that judges would "posture;" that witnesses and jurors would somehow be affected and that the response of the media would prevent an objective and dispassionate presentation and determination the Court concluded that:

> "These are concerns that any fair minded person would share because they would, certainly in combination, be antithetical to a fair trial. The fact remains, however, that the assertions are but assumptions unsupported

> by any evidence. No respondent has been able to point to any instance during the pilot program period where these fears were substantiated. Such evidence as exists would appear to refute the assumptions. The Survey reflects that the assumed influences upon participants during the experimental period were perceived to vary in degree from not at all to slightly. More importantly, there was no significant difference in the presence or degree to these influences as between the electronic and print media.
>
> . . .
>
> "With particular reference to the charge of an inflated appearance of newsworthiness created by the presence of the electronic media in the courtroom, it must be recognized that newsworthy trials are newsworthy trials, and that they will be extensively covered by the media both within and without the courtroom whether Canon 3A(7) is modified or not. Consequently if it is deemed to be to the public advantage to permit electronic media coverage in the courtroom, it seems inappropriate to be dissuaded by honestly perceived but unsubstantiated concerns as to adverse psychological effects on participants." [Emphasis added].

Moreover, in the reported experience of Judge Baker and the Zamora trial, Judge Baker found, contrary to Estes, that the overall press conduct was reasonable; that the intense publicity affected the jury

not at all, that the camera presence did not affect the jurors in performing their duty as jurors and that witnesses were unaffected by the presence of a television camera. AA5-AA12; AA21-27. In summary, Judge Baker concluded that there was no discernible difference in the Zamora trial, with respect to the Court, as to whether the trial was observed by spectators in the courtroom or spectators viewing the courtroom on television. AA22-AA23.

The Defendants and the amicus, California Public Defender, et al., attempt to disparage all the foregoing, by reference to the riots in Miami, Florida, on May 17-21, 1980, the "McDuffie" case riots [37]. The argument is poorly conceived. If

---

[37] A misnomer attached by the media to the case, State v. Diggs, et al. 11th Cir., Case No. 79-21601, relating to the victim, "McDuffie," who dies after a high speed chase and beating by police officers.

there was any fault on the part of the media for the May riots, it was accomplished many months prior to the riots[38]. A camera in a Tampa courtroom had nothing whatsoever to do with the circumstance, except to physically report the truth of the matter, that the police officers were

---

38. The infection of a "black versus white" issue occurred many months earlier in media reports of McDuffie's death, see e.g., The Miami Herald, "Five Officers Charged in Slaying," December 29, 1979, p.1A, where twelve (12) days after McDuffie's death, in the opening paragraphs the case was for the first time characterized:

> "Three of the policemen laughed and smiled as they were booked into Dade County Jail on manslaughter charges in the beating death of 33-year-old insurance executive Arthur McDuffie . . . .
>
> "The officers, all white, worked the midnight shift in Metro's predominantly black Central District. McDuffie, a former Marine and the father of three children was black." [Emphasis added].

The causes of the May riots may have been totally unrelated to any black versus white issue or McDuffie's death. See e.g., The Miami Herald, "Survey Reveals Unprecedented Black Bitterness," June 22, 1980, p.1A; 23A

acquitted[39]. See Hallom "Some Object Lessons on Publicity in Criminal Trials," 24 Minn. L.R. 453 at 462 (1940) (noting that in Hauptman, the case had been totally infected in the printed press long before trial); see also, Goldman, 10 S.W. Nev. L.R. 2001 at 2012, n. 70-71 (duscussing fatal infection of pretrial media coverage of Sheppard v. Maxwell); see also, remarks of Justice Hall, S.Ct. of Colo. 48 A.B.A.J. 1120 at 1121 ("the telecast spoke the truth"). Furthermore, the Defendants also ignore the fact that the defendants in State v. Diggs, were acquitted. Certainly that result is totally anomalous in the face of an argument that cameras inflame the jury and incite unjust convictions. Additionally, if the entire trial had been broadcast back to Miami from Tampa, the people

---

39. The trial was not viewed in Miami.

could have seen the system working instead of just the result. The people would have seen the intense cross-examination by excellent defense lawyers; the problems of an immunized witness, who may have participated in the crime; and the very credible testimony of Marrero, who was alleged to have delivered the fatal blow. There would have been less violence or none at all if all, if the public were not ignorant of the workings of their own court system[40]. See, Richmond Newspapers 48 U.S.L.W. at 5012 (the crucial need for a "community catharsis" and, "the fundamental, natural yearning to see justice done," [emphasis added] are the elemental reasons requiring a public trial); cf., also, In Re Oliver, 333 U.S. 256 (1948).

Recognized in the final analysis in

---

40. See also, analysis of so called "McDuffie" riots and other recent televised and untelevised trials at Section "IV C" of Brief of Post-Newsweek, et.al.

Post-Newsweek is a vital need to reeducate the people, as to their own judicial system. See 370 So.2d at 780; see also, e.g., In Re Hearings Concerning Canon 35, supra; Commonwealth v. Hayes, __Pa.__, 414 A2d 318, 337 (1980) (Kauffman, J. concurring); Weinstein, "Let the People Observe their Courts," 61 Judicature 156 (1977); cf., Richmond Newspapers. The Chief Justice of Alabama in observing a need for electronic media in Alabama courts has similarly concluded:

> "There is no field of governmental activity about which the people are so poorly informed as the judicial branch. It is highly inconsistent to complain of the ignorance and apathy of the people concerning the judiciary, and then to close the windows of information through which they might observe and learn."
>
> "Fair Trial v. Free Press: Time for a Rehearing?" 61 Judicature 154 (1977).

See also, Miller, "Should Canon 35 be Amended?" 42 A.B.A.J. 834 at 892 (1956). A camera in a courtroom as a "surrogate"

of the public's right to know, cannot therefore be reasonably said to be an "irrelevant" or "extraneous" element of trial court proceedings[41]. See, Richmond Newspapers.

Finally, although this is not a "sunshine" issue, the Florida commitment to open government is substantially analogous. See 370 So.2d at 780; see also, Ch. 119, Fla.Stat. (1977); § 286.011, Fla.Stat., (open public meetings law); cf., Article II §§ 8(a) and (b), Fla.Const. Electronic media coverage exists at all levels of public life in Florida[42]. See, also,

---

[41] The derogatory suggestion of the Amicus, California Public Defender et al., (Br. at p.25) that the efforts, policy and analysis of the Florida Supreme Court in Post-Newsweek, is nothing more than a "public relations stunt" to "improve the image of the judges" is purely scandalous. See, Sterns and Gressman, Supreme Court Practice §13.11 at 720 (5th Ed. 1978).

[42] The perception of television has changed substantially since Estes. It is no longer new, but rather is accepted

Brief of Post-Newsweek, et.al. The people of Florida are accustomed to a "minicam" at school board meetings; city council proceedings; county commission hearings; administrative hearings; in the Legislature[43]. and in many other public and governmental gatherings. The presence

---

[42]. (cont.) as a function of modern mass communication and the daily living experience, together with the morning and evening newspaper. See, Roper Organization Inc., "Public Perceptions of Television and Other Mass Media: A Twenty Year Review, (1958-1978)" (April, 1979).

[43]. The United States House of Representatives has approved and relied upon the long standing experience of the Florida Legislature, in developing its own approach to televising its proceedings. See, "Broadcasting the Proceedings of the House: A report of the Committee on Rules on its study of Alternative Methods of Providing Complete and Unedited Audio and Visual Broadcasting of the Proceedings of the House of Representatives, Pursuant to Section 3 of the House Resolution 866 Ninety-Fifth Congress together with Supplemental Authority, Dissenting and Minority Views," 95th Cong. 2d Sess. (February 15, 1978), at pp 39-45; and 56-59 (noting that Florida and forty-four (44) other states permit televised coverage of their legislative floor proceedings).

of a television camera simply does not have the novelty or psychological impact that it might have had during the Estes trial eighteen (18) years ago.

In the final analysis, the presence of the media, electronic or otherwise, at public meetings in Florida and in Florida's courtrooms is part of Florida's commitment to open government and the public's right to know. Concurrent with that concept, Mr. Chief Justice Burger succinctly stated in Richmond Newspapers:

> "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what ehty are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings..."
>
> 48 U.S.L.W. at 5012.

See also, Estes v. Texas, 381 U.S. at

---

43. (cont.) The parade of horribles marched out against Legislative coverage in Florida have also not materialized.

615-616 (White, J. dissenting). An uncannily parellel observation preceding the Chief Justice's remarks, was also precisely the rationale in Post-Newsweek:

> "In reaching our conclusion we are not unmindful of the perceived risks articulated by the opponents of change. However, there are risks in any system of free and open government. A democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works best when its citizens are informed about its workings. [Emphasis added].

Id. at 781

Where the "state action" herein has so clearly a "rational basis," this Honorable Court should not disturb that result. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, 421-422 (1974).

The Defendants' argument that the cameras are psychologically distracting, was probably also the same argument made when court reporters with their machines

replaced quill writers. The actual experience of Florida and other states refutes the argument[44]. Moreover, it is wholly apparent that substantial and carefully considered guidelines have been established and enforced in Florida, Wisconsin and other states, which clearly protect the Defendants' superior right to a fair trial. Cf., Green v. State, 377 So.2d 193 (Fla.3dDCA 1979). From the foregoing analysis, the Defendants' arbitrary assertion that it is okay if some of the people have the opportunity to see their trial, but unconstitutional if all of the people have the opportunity to see their trial, must be rejected.

---

44. See, e.g., Simonberg, "TV in Court" The Wide World of Torts," Juris Doctor 41, at 44 (April, 1979) (Colorado in twenty (20) years has never had a trial declared constitutionally unfair because of the mere presence of a television camera); State ex rel. Grinnel Communications Corp. v. Love, 62 Ohio St.2d (June 18, 1980) (there is no per se prohibition against electronic media).

Third Issue

IN THE TOTAL ABSENCE OF A CLEAR AND OVERRIDING FEDERAL INTEREST, THIS HONORABLE COURT SHOULD NOT INTERFERE WITH THE ADMINISTRATION OF THE STATE COURT JUDICIARY.

The final argument herein is also an integral part of the first argument. As noted above, at the "First Issue," there is simply no demonstration on this record of any prejudice whatsoever to these Defendants. Furthermore, the Florida Supreme Court exercised its authority herein not as a matter of constitutional interpretation, but rather pursuant to its inherent supervisory authority over all Florida state courts. 370 So.2d at 794.

Where a defendant fails to demonstrate any prejudice from state action, this Court has not hesitated to also conclude that no compelling federal question warrants, intrusion into the state court procedure. See e.g., County Court of Ulster County New York v. Allen, __U.S.__, 99 S.Ct. 2213

(1979); Wainwright v. Sykes, 433 U.S. 72 (1977); Henderson v. Kibbe, 431 U.S. 145 (1977); Whalen v. Roe, 429 U.S. 589 (1977); Murphy v. Florida, 421 U.S. 794 (1975); Broaderick v. Oklahoma, 413 U.S. 601 (1973); Williams v. Florida, 399 U.S. 117 (1970); Spencer v. Texas, 385 U.S. 554 (1967); Beck v. Washington, 369 U.S. 541 (1952); see also, considerations in, Stone v. Powell, 428 U.S. 465 (1976); Oshea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971); Railroad Commission v. Pullman Company, 312 U.S. 496 (1941); cf., Nixon v. Warner Communications, Inc., 435 U.S. 589, 614 (1978)(Stevens, J. dissenting: "Only an egregious abuse of discretion should merit reversal...[A]ppellate courts should observe with respect...a trial court's exercise of discretion concerning its own housekeeping practices"), In Whalen v. Roe, Mr. Justice Stevens explained the underlying doctrine herein upon which

the convictions and the state action below should be sustained:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be frought with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold. [Citing: New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931)(Brandeis, J. dissenting)]."
>
> 429 U.S. 589 at 597, n.20.

Guided by "the light of reason" even Mr. Justice Harlan recognized, while he limited Estes to its facts, that:

> "The question is frought with unusual difficulties. Permitting tele-

> vision in the courtroom undeniably has mischievous potentialities . . . Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation." [Emphasis added]. 381 U.S. at 587.

Cf. also, Spencer v. Texas, 385 U.S. 554, 559-569 (1967) (Harlan, J.); Estes, 381 U.S. at 614-615 (Stewart, J., joined by Black, J., Brennan, J., and White, J., dissenting). Justice Harlan's final conclusions also are directly relevant herein:

> "[W]e should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to reexamination in accordance with the traditional workings of the Due Process Clause." [Emphasis added]. Id. at 595-596.

It is wholly apparent from the actual experience of Florida and Wisconsin, and

other states (see also, Amicus Curiae breifs of RTNDA, et al.; Wisconsin, et al. and Post-Newsweek, et al.), that the visionary remarks of Justice Harlan have been borne out. The various concerns of the Estes court with multiple aspects of physical disruption; psychological disruption; exploitation; possible effects upon witnesses and jurors and abuse by the press[45]. have not been realized. See also, e.g., brief of Wisconsin, et al., point "III". The substantial fears of opponents of a camera in a courtroom are completely

---

[45]. The Supreme Court of Florida has expressly reserved a warning to the media:

> "Proponents represent, and we accept in good faith that this type of sensational and uncomplimentary coverage will be displaced by the sort of orderly and dignified in-court coverage demonstrated during the pilot program." [Emphasis added]. 370 So.2d at 781.

A violation of such 'good faith' would justify an appropriate response of partial closure. See, Richmond Newspapers; see also, Stephenson, "Fair-Trial-Free Press: Rights in Continuing Conflict" 46 Brooklyn L.R. 38 (1979)(necessity of guidelines).

dispelled by actual experience[46]. While in 1962 only two (2) states permitted cameras, now more than twenty-eight (28) states have experience with electronic media. Cf., the considerations in, McKeiver v. Pennsylvania, 403 U.S. 528, 548 (1971); Leland v. Oregon, 343 U.S. 790, 798 (1952). The State submits that in the case at bar, "[w]here there is no disruption of the 'essential requirement of fair and orderly administration of justice,' freedom of discussion should be given its widest range" [quoting Estes v. Texas, 381 U.S. at 615 (Stewart, J., dissenting)], and this Court should not interfere with the "laboratory" of the states. See also, Richmond Newspapers; Brief of Amicus Curiae, Conference of Chief Justices.

46. See, Aspen, 67 Illinois B.J. 82 (1978)(explaining negative attitude of Illinois Bar Members totally dispelled by actual observation of Zamora trial; further experimentation should be undertaken); see also, Netteburg, 63 Judicature 467 (1980).

VII.

CONCLUSION

The well-reasoned analysis and policy of the Florida Supreme Court is based upon cautious guidelines and actual experience. The accused's right to a public trial, which the public is permitted the opportunity to observe, is the very foundation of the justice system. Ironically, a proper historical analysis of the institution of the public trial binds us not to the past, but establishes the freedom of the future. This Honorable Court should therefore leave unfettered the diverse experience of the states and affirm the Florida Rule and the judgment and conviction below.

RESPECTFULLY SUBMITTED, on the eighteenth day of August, 1980, at Miami, Florida.

JIM SMITH
Attorney General of Florida

CALVIN L. FOX, Esquire
Assistant Attorney General